

Missouri Attorney General's Opinions - 1958

Opinion	Date	Topic	Summary
4-58	Apr 11	MAGISTRATES. PROSECUTING ATTORNEYS. INDICTMENTS AND INFORMATIONS. INFORMATIONS. CRIMINAL LAW. CRIMINAL PROCEDURE. MISDEMEANORS.	An information charging the commission of a misdemeanor may be filed upon the prosecuting attorney's knowledge, information and belief alone without being accompanied by complaint or other similar document.
4-58	June 12	Hon. Frazier Baker	WITHDRAWN
5-58	Apr 18	BANKS.	Notice to stockholders, as required by Sec. 363.840 RSMo 1949, whereby a merger of banking institutions is to be effected, is to be followed in lieu of notice required by Section 363.500 RSMo 1949.
5-58	Oct 14	Hon. G. H. Bates	WITHDRAWN
10-58	May 15	MUNICIPALITIES. LEASES.	A lease consummated by city officials who have a pecuniary interest in it comes within the purview of Section 106.300, Resume 1949.
12-58	Feb 3	Hon. O. O. Brown	WITHDRAWN
12-58	Nov 17	Hon. R. B. Browning	WITHDRAWN
13-58	Jan 14	Hon. Herbert F. Butterfield	WITHDRAWN
13-58	June 18	Mr. Donald W. Bunker	WITHDRAWN
15-58	Jan 13	JUVENILE OFFICERS. JUVENILE COURTS. CIRCUIT COURTS. THIRD AND FOURTH CLASS COUNTIES.	In circuits consisting of third and fourth class counties, juvenile officers must be appointed for entire circuit or two or more circuits, rather than for individual counties.
15-58	Apr 18	Hon. Milton Carpenter	WITHDRAWN
15-58	June 6	SAFETY RESPONSIBILITY UNIT.	(1) A person who has only a chauffeur's license and who has his license suspended, and is required by law to furnish proof of financial

		DRIVER'S LICENSE. CHAUFFEUR'S LICENSE.	responsibility should have his chauffeur's license returned to him upon furnishing proof of financial responsibility on all vehicles owned by him. (2) A person who has his license suspended and is required to maintain proof of financial responsibility and for whom there is filed proof of financial responsibility on one specific vehicle by a proper person under the terms of Section 303.250, should have his license, either operator's, chauffeur's or both, returned to him with a notation on the face of the license that said license is restricted to driving the particular vehicles for which proof was furnished.
15-58	Oct 10	Hon. Milton Carpenter	WITHDRAWN
15-58	Dec 17	PREVAILING WAGE LAW.	Construction work done by a public body upon public works comes within the purview of the Prevailing Wage law, regardless of the source of the funds used in such work, and, conversely, where work is not done by a public body it does not come within the purview of the Prevailing Wage law.
18-58	Mar 14	CONSERVATION COMMISSION.	Authority of agent to require aid, or deputize, in execution of process.
18-58	May 29	Hon. Arthur B. Cohn	WITHDRAWN
18-58	July 21	MOTOR VEHICLE LICENSE APPLICATIONS. COLLECTOR TO ISSUE RECEIPT OR STATEMENT TANGIBLE PERSONAL PROPERTY TAXES ARE PAID, EVEN IF MERCHANT'S TAX IS DELINQUENT.	One who pays all tangible personal property taxes assessed against him for preceding year, is entitled to tax receipt or, on request, to collector's certified statement showing taxes paid, even though party owes delinquent merchant's tax. Upon proper application for motor vehicle license, accompanied by such tax receipt or collector's statement, in accordance with Sec. 301.025, RSMo Cum. Supp. 1957, party entitled to receive license although merchant's tax is delinquent.
18-58	Aug 1	SCHOOL DISTRICTS. ANNEXATION. MANDAMUS.	After the Hart Consolidated School District conducted a special election for the purpose of annexing to the City of Anderson Consolidated School District, and after which the Secretary of the Hart Consolidated School District failed to certify the results of said election to the Anderson Consolidated School District, and subsequently the Anderson Consolidated School District, under the laws of Missouri became the Anderson Reorganized School District, a writ of mandamus to compel such certification of the results of said election should not be issued.
18-58	Nov 21	CORONERS: SPECIAL DEPUTIES.	Jackson County Coroner is without authority to appoint "special deputy coroners" except to fill those positions created by statute.

18-58	Dec 5	Hon. William A. Collet	WITHDRAWN
19-58	Feb 17	LEGISLATORS. STATE LEGISLATURE. GENERAL ASSEMBLY. RETIREMENT. STATE EMPLOYEES' RETIREMENT SYSTEM. STATE EMPLOYEES. EMPLOYEES. STATE OFFICERS. OFFICERS.	Member of the Legislature who have served eight or more years and who have not been refunded their accumulated contributions to the retirement fund continue as members of the system and may draw retirement benefits on reaching retirement age.
20-58	Aug 12	MILEAGE OF CIRCUIT JUDGES.	On and after July 3, 1958, at which time Senate Bill 14, enacted by the 69 th General Assembly in special session, became effective, judges of the circuit court should be reimbursed out of the state treasury for all reasonable and necessary travel expense actually incurred by them in such travel.
21-58	Jan 28	LAW PRACTICE.	Individual merchant is not practicing law when representing himself in a court of record. Collection agency is practicing law when attempting to collect an account of a merchant in the magistrate court on a contingent basis.
21-58	July 21	MAYOR. OFFICE OF PROFIT. FEDERAL EMPLOYEE.	(1) Under Article 7, Section 9 of the Missouri Constitution of 1945, the mayor of a third-class city in the State of Missouri would be the holder of an office of profit in this state. (2) A civil service employee under the Small Business Administration Act of the Federal Government is not necessarily by virtue of such employment a holder of an office of profit under the United States, but depending upon the facts of each situation of employment that civil service employee might be deemed an employee as distinguished from a holder of public office.
21-58	Nov 7	Hon. Dick B. Dale, Jr.	WITHDRAWN
25-58	Oct 22	Hon. Manuel Drumm	WITHDRAWN
26-58	Feb 10	TAXATION. MERCHANTS AND MANUFACTURERS. MANUFACTURERS.	The term "raw materials", as used in Sections 150.310 and 92.040, RSMo 1949, means and includes all materials and things out of which the final or finished product is made.
26-58	July 15	Hon. Thomas F. Eagleton	WITHDRAWN
32-58	Mar 10	ELECTIONS. BOARD OF ELECTION COMMISSIONERS.	Construction of Sec. 111.255, RSMo, Cum. Supp. 1957, providing for one polling place and one set of election officials where two elections are being held in the political subdivision on the same day.

		COUNTY COURT. SCHOOLS. MUNICIPALITIES.	
32-58	June 13	Hon. C. Rouss Gallop	WITHDRAWN
32-58	July 28	INHERITANCE TAXES. UNITED STATES SAVINGS BOND TRANSFERS. WHEN TAXABLE.	United States Savings Bonds, Series E, purchased more than two years prior to decedent's death, registered in her name, and on her death payable to her son, is a gift intended to come into possession and enjoyment of decedent's son at or after her death, and is a taxable transfer within the meaning of subsection 3, Section 145.020 RSMo Cum. Supp. 1957. It is immaterial as to whether or not transfer was made in contemplation of decedent's death within the two-year period referred to in subsection.
32-58	Oct 6	VOTING MACHINES.	It is the opinion of this office that the proposition of the retention in office of certain judges under Article V, Section 29(c) (1) of the 1945 Missouri Constitution can be properly submitted to the voters of this State on voting machines.
32-58	Dec 5	Hon. Edward W. Garnholz	WITHDRAWN
33-58	Jan 23	PREVAILING WAGE LAW. SCHOOL DISTRICTS. CITIES, TOWNS AND VILLAGES. MUNICIPALITIES.	The so-called prevailing wage law, as contained in Sections 290.210 to 290.310, RSMo Cum. Supp. 1957, applies to and includes incorporated municipalities and school districts.
33-58	Feb 11		Opinion letter to the Honorable Floyd R. Gibson
33-58	Mar 10	COUNTY HOSPITALS. OFFICERS.	Trustees of county hospital organized as provided in Section 205.190, RSMo 1949, are authorized to provide salary for one of their members acting as secretary to the board of trustees.
33-58	Mar 26	OFFICERS.	Offices of mayor of third class city and county collector of third class county are not incompatible nor inconsistent and both may be held by the same citizen at the same time.
33-58	May 29	COUNTIES. MISSOURI COMMISSION OF RESOURCES AND DEVELOPMENT.	(1) Counties of Platte, Clay and Cass in Missouri have authority to contract, singly or jointly, with a planning agency to formulate plans for general land use. (2) Missouri Commission of Resources and Development has authority to carry out area planning in State. (3) Eligibility of Community Facilities Service Department of University of Missouri to accept local matching funds for planning in metropolitan areas to be determined by Federal agency making such funds available.

35-58	Apr 29	Hon. Thomas D. Graham	WITHDRAWN
37-58	Apr 7	SOFT DRINKS AND BEVERAGES. LICENSES.	A manufacturer of syrups and concentrates used in the concoction of soft drinks and beverages is not required to secure a license from the Division of Health. Such products, however, and the place of their manufacture, and or processing, are not exempt from the operation of the General Food Inspection and Sanitation Law of this state.
37-58	Apr 24	COUNTY HEALTH CENTERS.	Sections 205.010 to 205.155 RSMo 1949, as amended, do not authorize the circulation of petitions in county submitting to a vote of the people a proposition to cut down a county health unit tax of ten cents, to five cents, and put that portion of the reduced levy into an indigent fund to be disbursed by a board to be appointed by someone or elected as the county board of health center trustees is elected.
37-58	May 1	BUREAU OF VITAL STATISTICS.	Upon the offer of satisfactory proof of a registrar of vital statistics may issue a new birth certificate in the new name of the legitimated child; the registrar of vital statistics may not refuse to accept a birth certificate simply because it shows upon its face that the father of the child is not the husband of the mother.
37-58	Sept 2	MILK AND MILK PRODUCTS. ORDINANCE OF CITY OF ST. LOUIS.	Paragraphs B-11 and B-12 of Section I of Ordinance No. 47605 of the City of St. Louis, as amended by Substitute Board Bill No. 472, relating to milk sanitation and the regulation of the production, handling, and sale of milk and milk products, are invalid because of their conflict with Section 196.705, RSMo 1949; a product prepared by adding hydrogenated vegetable fat, vanilla, and gelatin base stabilizer to cream containing 18% milk fat is a lawful product under the provisions of Section 196.705, RSMo 1949, if it is not in imitation or semblance of milk, cream, or skim milk.
37-58	Oct 17	WATER POLLUTION BOARD. CONSTITUTIONAL CHARTER CITIES. SEWAGE DISPOSAL SYSTEMS.	Kansas City, Missouri, and other constitutional charter cities of the State of Missouri, are required to obtain a permit for the construction of sanitary sewers, by virtue of Chapter 204, RSMo, Cum. Supp. 1957, when the disposal of sewage, industrial wastes or other wastes constitute pollution as defined in this chapter; that those constitutional charter cities are required to submit plans and specifications for proposed additions to their sewage collection system when the discharge of sewage constitutes pollution as defined in this chapter.
37-58	Nov 7	WATER POLLUTION BOARD. FEDERAL JURISDICTION. STATE HOSPITALS.	1. Since the purpose expressed by the enactment of Chapter 204 of the Revised Statutes of Missouri, Cum. Supp. 1957, is effected by Section 466h of Title 33, United States Code Annotated, there has not arisen a situation which would necessitate the requirement by the State of Missouri that facilities of a specific type be constructed or maintained by Federal agencies and installations in the State of

			Missouri, nor that they be required to obtain a permit to discharge waste into the waters in Missouri. 2. Missouri state installations such as the state hospitals at Farmington and Nevada are subject to Chapter 204, RSMo, Cum. Supp. 1957, and are required to obtain construction permits for sewage disposals and to discharge wastes into the waters of the state.
38-58	Mar 21	SCHOOLS.	Change of boundary lines may be voted on only at annual school election; no limit as to number of times such petitions may be presented and voted upon.
38-58	Apr 1	CONSTITUTIONAL LAW. GENERAL ASSEMBLY.	Under the provisions of Section 20(a) of Article III, Constitution of Missouri, the second extraordinary session of the General Assembly would be automatically adjourned sine die on midnight, Friday, April 4, 1958, unless it had adjourned sine die prior thereto.
38-58	Apr 16	PERMITS. TAXATION.	County courts of fourth class county may not issue permits for purpose of taxation for all new buildings constructed in the County. It is the licensed manufacturer, within § 150.300 to 150.320, RSMo 1949, against whom the personal property taxes applicable are assessed.
38-58	May 9	Mr. Edward E. Haynes	WITHDRAWN
40-58	June 2	Hon. Craig Hiller	WITHDRAWN
40-58	June 5	INHERITANCE TAXES. ANNUITY PROCEEDS. TAXABLE – WHEN.	When decedent paid annual fixed premium for life; under terms of annuity contract, was not to receive any return of premiums or income thereon during her life; had right to change beneficiaries but did not, and on her death premiums paid company or cash value, whichever was greater, to be paid named beneficiaries, and beneficiaries to come into possession and enjoyment of fund at or after decedent's death. Said transfer is taxable under provisions of par. 3, Sec. 145.020, RSMo Cum. Supp. 1957.
41-58	May 20	TAXATION. PUBLIC UTILITIES. STATE TAX COMMISSION.	The State Tax Commission has the power of original assessment only over public utilities; whether an incorporated mutual telephone company is a public utility, in whole or in part, is a question of fact to be determined by reference to the actual operation of the company.
41-58	Aug 11	COUNTY TREASURER. FUNDS, SURPLUS. GENERAL REVENUE.	A balance accumulated in a special fund (County Superintendent of Schools Clerical Fund) maintained by a County Treasurer of a third class county, of funds received from the State of Missouri, under the provisions of Section 167.230 RSMo Cum. Supp. 1957, is to be returned to the State of Missouri at the end of each fiscal year in which such balance has accrued.
41-58	Aug 22	STATE AUDITOR. PUBLIC RECORDS.	When an audit of a six-director school district is requested under the provisions of Section 29.230, RSMo 1949, by a petition containing the

		PUBLIC INFORMATION.	signatures of five per cent (5%) of the qualified voters, it is not necessary for the Office of State Auditor to furnish a photostatic copy of that petition to the board of education of the school district; or to any other person, even though it may have been requested.
42-58	Jan 7	SCHOOL BOARDS' EMPLOYEES.	A person who is not a member of a town school board may serve as secretary to that board and receive the maximum compensation allowed by law and also serve as secretary to the superintendent of schools of such district.
43-58	Jan 22	COURTS. JUVENILE COURTS. CONSTITUTION.	Section 211.321, RSMo 1949 Cum. Supp. 1957 is constitutional.
43-58	June 12	JUVENILE RECORDS.	A person who is not an officer of the court, peace officer, or custodian of juvenile records who communicates information pertaining to juveniles which information he has not obtained directly or indirectly from juvenile court or peace officers' records is not subject to prosecution for violation of Section 211.321, RSMo Cum. Supp. 1957.
44-58	Mar 19	APPROPRIATIONS. GENERAL ASSEMBLY. CONSTITUTION. LEGISLATURE.	Where the General Assembly makes appropriations in all of the preceding categories, an appropriation in a particular category set forth in Section 36, Article III, Constitution of Missouri, is not unconstitutional because such appropriation is contained in a bill which is finally passed in advance of the final passage of the bill or bills containing the appropriations in the preceding categories.
45-58	Apr 25	OPTOMETRIST. LICENSE RENEWAL.	A registered apprentice may get a new registration certificate under a new sponsor, upon compliance with other applicable laws, when original sponsor has become deceased.
45-58	Nov 12	COUNTIES. COUNTY CONTRACTS. REGIONAL PLANNING. COUNTY COOPERATION. PLANNING AGENCY.	Jackson, Platte, Clay, and Cass counties may contract for county planning jointly with Federal government.
46-58	Jan 8	COUNTY PUBLIC WATER SUPPLY DISTRICTS. MISSOURI PUBLIC SERVICE COMMISSION.	Public Service Commission of Missouri does not have jurisdiction over county public water supply districts incorporated under Sections 247.010 to 247.220, RSMo 1949, as amended; and property owner in such water supply district seeking to enforce extension of services to his property, must seek his remedy through the circuit court.
46-58	July 23	ESTATE TAXES. INHERITANCE TAXES.	Section 145.070, RSMo 1949, imposes an additional tax on estates when the inheritance, legacy and succession taxes, etc., paid to the

		ADDITIONAL STATE TAX ACT.	estate, do not equal the credit authorized by the Federal estate tax act.
50-58	May 28	TAXATION. COUNTY ASSESSORS. STATE TAX COMMISSION.	The assessment blanks for use in Jackson County, Missouri, must contain a classification of all tangible personal property as specified in Section 137.120, RSMo 1949, including such items as farm machinery, livestock and other domesticated animals and that the State Tax Commission has no authority to delete said items from the assessment blank.
52-58	Jan 8	INSURANCE.	Articles of Incorporation of Abraham Lincoln Life Insurance Company.
52-58	Jan 20	INSURANCE.	Articles of Incorporation of Church Extension Brotherhood of America
52-58	Feb 14	INSURANCE.	Described "automobile warranty" issued by National Warranties, Inc., not an insurance contract subject to regulatory provisions of Missouri insurance code.
52-58	Mar 13	SCHOOLS. SCHOOL DISTRICTS.	Part of C-2 District of Audrain County cannot be detached therefrom and attached to Mexico District, either by annexation or change of boundary lines, because the two districts are not contiguous.
52-58	Mar 20	Hon. John K. Leopard	WITHDRAWN
52-58	Apr 15	INSURANCE.	Articles of Incorporation of Professional Mutual Insurance Company
52-58	Apr 21	INSURANCE.	Described contract offered by E. B. Koonce Mortuary, Inc. is a contract of insurance, and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310, RSMo 1949.
52-58	Apr 23	INSURANCE.	Articles of Incorporation of Old Missouri Life Insurance Company.
52-58	May 13	INSURANCE.	Articles of Agreement of Mid-America Insurance Company
52-58	July 3	INSURANCE.	Superintendent of Insurance has right of visitation and examination of records and affairs of Missouri corporate attorney in fact for a domestic reciprocal or inter-insurance exchange to the extent that the records of the attorney in fact disclose the financial condition of the reciprocal or inter-insurance exchange. Failure to permit such examination is grounds for revocation or suspension of license to conduct an insurance business in Missouri through the attorney in fact.
52-58	July 28	CORONER'S INQUEST. SHERIFFS' FEES. WITNESS FEES. JURY FEES.	(1) Sheriff not allowed fee for summoning jurors for coroner's inquest. (2) Sheriff not allowed mileage for travel in connection with coroner's inquest. (3) Sheriff allowed fee for summoning witnesses to attend coroner's inquest. (4) Jurors and witnesses summoned to attend coroner's inquest receive statutory per diem fee regardless of number of summons they received or number of inquests actually attended on same day. (5) Where multiple deaths result from one casualty, coroner

			should conduct one inquest to determine cause of death of all persons who died as a result of said casualty.
52-58	Oct 1	INSURANCE.	Certificate of Credit described in opinion is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310, RSMo 1949.
52-58	Nov 7	INSURANCE.	Articles of Incorporation of MFA Life Insurance Company.
53-58	Apr 30	Hon. Stephen N. Limbaugh	WITHDRAWN
54-58	May 22	COLLEGE BOOK STORES. STATE PURCHASING OFFICE.	Funds expended by any public institution owned, managed or controlled by the state are subject to Sections 216.475 through 216.520, RSMo Cum. Supp. 1957, whether appropriated or local.
54-58	Sept 22	AFFIDAVITS. STATE TREASURER. STATE PURCHASING AGENT.	1. On delivery of those supplies procured through the office of the state purchasing agent and not followed by an invoice with the accompanying affidavit required by Section 26 of House Bill No. 12, 69th General Assembly, Second Extraordinary Session, it does not come within the jurisdiction of the state purchasing agent to cancel the contract for the supplies as he would under his rules and regulations for breaches of contract. 2. Section 26, House Bill No. 12, 69th General Assembly, Second Extraordinary Session, is meant to have no effect upon the method in which contracts are written and executed by the State of Missouri.
58-58	Dec 1	DIVISION OF HEALTH REGULATIONS.	The Division of Health is authorized to make a regulation with respect to the length of vents for gas heaters in the tourist cabin.
59-58	Feb 10	PUBLIC WORKS. APPROPRIATIONS.	The State is not legally obligated by the terms of a contract for the construction of a public works project to pay to the contractor sums in excess of the amounts appropriated for said project.
62-58	Sept 29	ELECTIONS. SPECIAL ELECTIONS. CHARTERS. BOARD OF ELECTION COMMISSIONERS.	Special election for annexation to City of Independence may be conducted on same day as Jackson County charter election.
63-58	May 15	MOTOR VEHICLE REGISTRATION. TRUCKS EQUIPPED WITH WINCHES MUST BE LICENSES.	Trucks driven on the highways from job to job, or to garages for repair must be registered.
65-58	May 22	COMPATIBILITY OF	A person may file for both a county office and for county

		OFFICES. FILING FOR OFFICES.	committeeman on the same ticket at the same time.
65-58	June 27	COUNTY BOARD OF EQUALIZATION.	It is the opinion of this department that in a county in which there is no county surveyor that the county board of equalization may nonetheless function.
66-58	Jan 9	CUMULATIVE SENTENCES. COMMITMENTS. DEPARTMENT OF CORRECTIONS. PAROLEES.	(1) The cumulative sentence provision of Section 222.020, RSMo 1949, is not applicable to a sentence followed by a commitment thereupon to the penitentiary, where such sentence was imposed upon a conviction for an offense committed by a parolee from the Intermediate Reformatory prior to the completion of said parole; (2) an amendment to Section 222.020 is necessary since under Section 5, House Bill No. 208, 69th General Assembly, there are no longer any sentences to the penitentiary.
66-58	June 18	STATE HOSPITALS. PAY PATIENTS. CHARGES.	Section 202.330, RSMo Cum. Supp. 1957, is applicable to patients committed to state hospitals prior to the effective date of the above statute; that the Division of Mental Diseases may charge pay patients in state hospitals the maximum amount fixed by the division for each institution or any amount below that maximum based upon the ability, or means of the patient, to pay. A husband is liable for the support of his wife unless she has abandoned him without good cause or has abandoned him with cause, and has contracted an adulterous relationship consequently; that a husband is liable for the support of his minor children; that in the absence of the husband or his inability to support minor children the same obligation devolves upon the wife. Persons who adopt a child and persons who stand in the position of in loco parentis have the same duty to support as do natural parents.
68-58	Apr 30	STATE ANATOMICAL BOARD. DECEASED BODIES, CONTROL OF.	Body required to be buried at public expense is under control and custody of Missouri State Anatomical Board.
68-58	July 23	OFFICE OF RECORDER.	There is no minimum age requirement for a deputy recorder of deeds in a third-class county in which the office of recorder and circuit clerk are separate. There is no minimum age requirement required for a person to sign the margin of record as the assignee of the beneficiary in connection with a trust deed release.
70-58	Dec 12	Hon. Glenn Pearl	WITHDRAWN
72-58	Feb 4	LIBRARIES. CITY. COUNTY.	(1) City of less than five thousand, with free public library established and maintained by mill tax levied under authority of Sec. 182.160, RSMo 1949, prior to effective date of Sec. 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, may continue operation of library after

			<p>repeal of section, but could not levy a tax until enactment of House Bill 253, 69th General Assembly. (2) City of less than five thousand, which established and maintained free public library under provisions of Sec. 182.160, RSMo 1949, prior to effective date of Sec. 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, may, under provisions of House Bill 253, 69th General Assembly, levy a library tax at the rate and in the manner authorized by Sec. 182.140, RSMo Cum. Supp. 1955. (3) Residents of city of less than five thousand, whose public library was established under authority of Sec. 182.160, RSMo 1949, prior to the effective date of Sec. 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, and still in operation, are ineligible to sign a petition for a proposed county library under provisions of Sec. 182.010, RSMo Cum. Supp. 1957.</p>
72-58	Feb 13	STATE LIBRARIES. STATE AID.	<p>It is the opinion of this department that State aid cannot legally be given to any public library if the rate of tax is decreased below the rate in force on December 31st, 1946. It is the further opinion of this department that State aid may be granted to any public library if the rate of tax is not below the rate in force on December 31st, 1946, and if the library has at least a one mill tax voted in accordance with sections 182.010 through 182.460, RSMo 1949, or if the tax income for such library yields one dollar or more per capita for the previous year on the basis of population as set forth in the most recent Federal census.</p>
72-58	Apr 4	DRIVER'S LICENSE SUSPENSION. HABITUAL RECKLESS OR NEGLIGENT DRIVER. HABITUAL VIOLATOR OF TRAFFIC LAWS.	<p>A careless and reckless driving charge can be made only under authority of Section 304.010-1. The Director of Revenue has authority to suspend a license when reliably informed that there is a showing by public records that there has been a sufficient number of convictions to authorize the same.</p>
72-58	Apr 25	PROBATION.	<p>The time spent by a person who has plead guilty, or been found guilty of a crime, and who has been released by the court without imprisonment, subject to the supervision of the court or parole or probation service is time on probation, and such time does not apply under Section 549.275, RSMo 1949, towards final discharge of the prisoner.</p>
72-58	Oct 16	MERCHANTS. LICENSE. TAX.	<p>Warehouses located in Clay County, Missouri storing merchandise for a number of companies whose offices are not in Clay County, Missouri, and which act merely as shipping points for merchandise which has been sold elsewhere are not to be considered merchants within the purview of Chapter 150, RSMo 1949.</p>

74-58	Jan 6	Hon. C. Frank Reeves	WITHDRAWN
76-58	Mar 26	TAXATION. STATE TAX COMMISSION. ASSESSMENT. PIPELINE COMPANIES. TELEPHONE COMPANIES.	The exchange equipment of telephone companies and the pumping equipment of pipeline companies, together with the buildings housing the same and the land upon which the same are located, should be assessed by the State Tax Commission.
76-58	Dec 9	STATE TAX COMMISSION. TAXATION. ASSESSMENT.	Buildings and structures housing the generating equipment of electric companies which are public utilities, including dam sites and real property used in conjunction therewith, are to be assessed locally and are not to be assessed by the State Tax Commission.
77-58	Sept 24	Hon. June R. Rose	WITHDRAWN
80-58	July 22	BIENNIUM. GENERAL REVENUE. STATE TREASURER.	Moneys and funds for which balances are subject to transfer to General Revenue shall be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer at the end of the biennium after all warrants on same have been discharged and the appropriation thereof has lapsed.
80-58	Dec 5	CONSTITUTIONAL LAW. STATE COMPTROLLER. STATE AUDITOR.	(1) Constitutional Amendment No. 1, appearing on the ballot as Proposition No. 3 in the November 4, 1958 general election amending Sections 22 and 28 of Article IV of the Missouri Constitution of 1945, is "self-executing" and the full operation of the same is not dependent upon legislative action. (2) Any and all statutory provisions in "conflict" with said amendment (the amendment being the last expression of the lawmaking power) and its full operation, are insofar as their future operation is concerned after the effective date of the amendment, deemed repealed. (3) The signature of the state auditor on the form of warrant now in supply would not in any way affect its efficacy.
82-58	Aug 26	TRAVELING EXPENSES. APPROPRIATIONS. COMMISSIONS.	Members of the Missouri Commission on Human Rights may be reimbursed for travel expenses incurred in the necessary conduct of the commission's business.
84-58	Mar 19	CIRCUIT COURTS.	Jackson County circuit court, en banc, is without authority to order transfer of circuit judge from either of two divisions of said circuit court required to sit at Independence, to try causes pending in the several divisions of said circuit court sitting in Kansas City. Said circuit court, en banc, may designate divisional judges sitting at Independence as presiding or assignment judge of circuit court of Jackson County.
84-58	June 6	INSANE.	A person who is now a nonresident, but who has been properly

		PROSECUTING ATTORNEYS. DEPOSITIONS. PROSECUTING ATTORNEY'S EXPENSES.	declared insane by a Missouri court, can apply to the probate court in the county in which he was adjudicated insane for restoration of his sanity. He need not be personally present on the day of the hearing, and he may have depositions, properly taken, introduced as evidence in the case. The county court, if they believe that the expenditure of public funds is justified by the magnitude of the public interest in the case, may pay the prosecuting attorney's travel expense out of state to take depositions.
84-58	July 29	Hon. Floyd L. Snyder, Sr.	WITHDRAWN
85-58	Jan 15	SALES TAX.	A contractor who makes permanent installations of personal property into real estate is not required to collect 2% sales tax for the materials used in the installation. Further, where a contractor purchases tangible personal property from a subcontractor or a material man 2% sales tax must be paid.
87-58	Jan 20	OPTOMETRY. REGULATIONS.	Validity of Proposed Regulations.
88-58	Mar 14	EMPLOYMENT SECURITY.	J. E. Taylor, Director, authorized to requisition funds from federal Unemployment Trust Fund.
88-58	Nov 13	SCHOOLS. SCHOOL BUSES. EMPLOYMENT SECURITY. MOTOR VEHICLES.	Use of school buses to transport agricultural day-haul workers under Employment Security Program.
89-58	Apr 1	COUNTIES. COUNTY COURT.	County court in county of third class may not invest funds in United States Government securities except surplus in sinking and interest fund and county and township school funds.
89-58	May 29	CONSTITUTIONAL LAW. APPROPRIATIONS.	Secs. 4.510 and 4.520 of S.C.S.H.C.S.H.B. No. 4, 69 th General Assembly, Second Extra Session, appropriating monies for personal services for employees of Missouri Conservation Commission, but excepting salary increases, violates Sec. 23, Art. 3, Mo. Const. 1945, as appropriation measure containing legislation. Unconstitutional portion may be eliminated without causing both sections to fall.
89-58	June 24	INITIATIVE PETITIONS. FILING DATE. CALENDAR MONTH.	Initiative petitions must be filed with the Secretary of State on or before midnight, July 3, 1958, since that date is the last day which is not less than four months before the General Election, which this year will be November 4, 1958.
89-58	Dec 1	SCHOOLS. SCHOOL DISTRICTS.	County plan of reorganization may be submitted even though it includes territory of another county which has less than one year

			previously voted upon a rejected plan of reorganization for such other county.
93-58	Jan 16	JUVENILE CODE. PEACE OFFICERS' RECORDS. HIGHWAY PATROL.	(1) Copies of reports on recovered vehicles may be furnished to the National Automobile Theft Bureau or other agencies concerned with ownership of the vehicle or with prosecution of offenses so long as the name of the child is omitted from such reports; (2) copies of accident reports may be furnished to insurance companies and attorneys who are interested in civil actions so long as there is an omission from such reports of the charge of an offense; (3) likewise, and under the same conditions, copies of accident reports may be furnished to the Missouri State Highway Department; (4) information concerning juveniles may be furnished to other law enforcement agencies and the proper authorities may be notified when juveniles are taken into custody for violation of laws in other states or federal jurisdictions so long as such information is furnished with an understanding that it is not to be public information.
93-58	July 3	STATE HIGHWAY PATROL.	Members may serve police demand order for surrender of license and registration at locations other than on a public highway and the acceptance of voluntary surrender of license to a member of the patrol does not constitute a seizure within Senate Bill No. 7 of the 69 th General Assembly.
94-58	May 15	ELECTIONS. SCHOOL DISTRICTS. TAX LEVY INCREASE.	Before there can be a valid election to increase the school district tax levy there must be sufficient notice of such election and purposes. For purpose of increasing school term from 8 to 9 months, there need not be notice of such election.
95-58	Apr 25	TAXATION. TAX SALE. COUNTY COURT.	In the event that a sale and conveyance of land for taxes is invalid because the taxes on said land had, in fact, been paid, the county is not liable for payments to the purchaser of such invalid sale except as provided in Section 140.530, RSMo 1949. The county in which the land is located does not warrant and defend title in a suit brought by the owner of the property sold at tax sale.
96-58	Jan 23	Mr. Hubert Wheeler	WITHDRAWN
96-58	June 5	Mr. Hubert Wheeler	WITHDRAWN
97-58	Feb 3	STATUTES. JURORS AND WITNESS' FEES. ASSESSORS.	Construction of Section 137.131(3) Mo.RS Cum. Supp. 1957.
97-58	Oct 27	ELECTIONS. COSTS OF CANVASS OF PRIMARY	The cost of a primary election canvass in Kansas City is a general expense which is to be paid both by Kansas City and Jackson County equally, as per statute. Section 117.140, RSMo Cum. Supp. 1957.

		ELECTION IN KANSAS CITY, MISSOURI.	
98-58	June 27	EXTENSION OF BOUNDARIES OF SPECIAL CHARTER CITY WITH POPULATION OF LESS THAN 20,000.	A special charter city of less than 20,000 inhabitants should extend its boundaries under the provisions of Section 81.080, RSMo, Cum. Supp. 1957, and of Section 71.015, RSMo, Cum. Supp. 1957, when unincorporated areas are to be annexed.
100-58	Feb 19	ANIMALS. DEAD BODIES. STATUTES.	The proposed operation, as stated in this opinion request, comes within the purview of Chapter 269, RSMo 1949.

MAGISTRATES: PROSECUTING ATTORNEYS:
INDICTMENTS AND INFORMATION:
INFORMATION: CRIMINAL LAW:
CRIMINAL PROCEDURE: MISDEMEANORS:

An information charging the commission of a misdemeanor may be filed upon the prosecuting attorney's knowledge, information and belief alone without being accompanied by complaint or other similar document.



April 11, 1958

Honorable Frazier Baker
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

You recently requested an opinion from this office concerning the following:

"Does a Magistrate acquire full jurisdiction of a misdemeanor case when the Prosecuting Attorney files, in the Magistrate Court, information verified by the Prosecuting Attorney based upon the Prosecuting Attorney's knowledge, information or belief, and the information not being accompanied by a complaint, as described in Section 543.020, R. S. Mo., 1949, or any other document? Is the official oath of the Prosecuting Attorney, or verification, based on knowledge, information or belief, as set forth in Supreme Court Rule 24.16 or Sections 543.020 and 543.030, R. S. Mo., 1949, any different?"

Under the statutes to which you refer it has long been the holding of the Supreme Court of Missouri that an information filed by the prosecuting attorney upon his own knowledge, information and belief is sufficient and that there is no requirement that such be filed upon his own actual personal knowledge or that there be a verified complaint filed with him or with the court by some other person having actual knowledge. See, in this connection, State v. Ransberger, 106 Mo. 135, 17 S.W. 290, where this result was reached after an extended discussion and consideration of this problem.

Honorable Frazier Baker

The Supreme Court rules expressly and clearly provide that an information charging the commission of a misdemeanor may be filed either upon knowledge, information and belief of the prosecutor, or upon the basis of a verified complaint. This provision is found in Supreme Court Rule 21.03, which reads as follows:

"21.03--Misdemeanors--Information--Prosecuting Attorney. The prosecuting attorney of a county or city in which an offense may be prosecuted may make an information charging the commission of a misdemeanor either upon his own knowledge, information and belief or upon the basis of a verified complaint previously submitted to him. Such information shall be filed in any court having jurisdiction to try the offense charged."

When such information has been filed, the Magistrate Court thereby acquires complete jurisdiction of the subject matter of the case against the defendant. The jurisdiction of the court over the person of the defendant must, of course, be acquired as provided by law to give the court jurisdiction of both the subject matter and the person.

As to your second inquiry, the verification by the prosecuting attorney on his knowledge, information and belief referred to in Rules 21.03 and 24.16 is the same as that referred to in Sections 543.020 and 543.030 RSMo 1949.

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that a prosecuting attorney may file an information charging the commission of a misdemeanor on his knowledge, information or belief alone, and that such need not be accompanied or supported by a verified complaint.

The filing of such information gives the court jurisdiction of the subject matter of the case against the defendant.

Honorable Frazier Baker

Jurisdiction of the person of the defendant must be acquired as provided by law and is not acquired merely by the filing of the information.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

FLH:vlw

BANKS: Notice to stockholders, as required by Sec. 363.840 RSMo 1949, whereby a merger of banking institutions is to be effected, is to be followed in lieu of notice required by Section 363.500 RSMo 1949.



April 18, 1958

Honorable G. H. Bates
Commissioner of the Division of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Bates:

This opinion is rendered in reply to your recent request reading as follows:

"Pursuant to Section 362.235 RSMo. Cumulative Supplement 1957, and Section 363.830 RSMo. 1949, I have certified my approval of an agreement to merge between a National bank located in this state and a State trust company having banking powers. A copy of such agreement to merge is attached hereto.

"Section 363.840 RSMo. 1949 provides that the agreement to merge must be submitted to stockholders of the two merging institutions within sixty days following my approval of the agreement to merge.

"Your opinion is requested to determine if the two weeks' notice required by Section 363.840 RSMo. 1949, will suffice for the sixty day notice required by Section 363.500 RSMo. 1949 when a trust company seeks to avail itself of privileges provided for in Chapter 363 RSMo. 1949 which ordinarily entail an amendment to articles of incorporation."

The basic legislative enactment in Missouri authorizing the type of merger referred to in the above inquiry is Section 362.235 RSMo Cum. Supp. 1957, with subsection 1 of such statute providing, in part:

Honorable G. H. Bates

"1. Any national banking association incorporated under the laws of the United States having its place of business in this state may be * * * merged with one or more banks or trust companies incorporated under the laws of this state under the charter of a bank or trust company incorporated under the laws of this state, upon compliance with the laws of the United States in such cases made and provided and upon obtaining the approval of the commissioner of finance of the state of Missouri.
* * * "

In consummating the merger with which we are dealing, the legislature has directed in what manner it is to be accomplished, in the following language from subsection 4 of Section 362.235 RSMo Cum. Supp. 1957:

"In the case of consolidation or merger the same shall be consummated by each national banking association complying with the laws of the United States thereto relating, and also by each national banking association and each bank or trust company complying with the provisions of the laws of this state relating to the consolidation or merger of trust companies, except that it shall not be necessary for a national banking association to obtain the consent of its shareholders in the manner provided by such law of this state,
* * * ."

The language quoted above from subsection 4 of Section 362.235 RSMo Cum. Supp. 1957, is direct and positive in its directive specifying that the manner of consummating the merger be that manner found spelled out in "the laws of this state relating to the consolidation or merger of trust companies." Provisions of the laws of Missouri relating to the consolidation or merger of trust companies are found at Sections 363.770 to 363.970 RSMo 1949.

Section 363.840 RSMo 1949 sets forth procedure to be followed when approval of the agreement to merge has been given by the Commissioner of Finance, and such statute is herewith quoted in full:

Honorable G. H. Bates

"1. In case of approval by the finance commissioner, such agreement shall within sixty days after the date of such approval be submitted to the stockholders of each trust company which is a party to such merger or consolidation.

"2. The meeting of the stockholders of each such trust company for said purpose shall be called upon notice specifying the time, place and object thereof, addressed to each stockholder at his last known post-office address and deposited, postage prepaid, in the post office at least two weeks prior to such meeting, and such notice shall be likewise published once a week for at least two successive weeks in at least one newspaper in each of the counties in which any of such trust companies has its place of business, and for the purpose of such notice the city of St. Louis shall be considered as a county."

Section 363.840 RSMo 1949, quoted above, discloses the scope of the notice to stockholders, the method of bringing such notice to the attention of the stockholders, and specifies that the proposition shall be submitted to a vote within sixty days after approval of the agreement to merge has been given by the Commissioner of Finance.

In your letter of inquiry, you have referred to Section 363.500 RSMo 1949, which provides:

"1. Whenever any trust company shall desire to call a meeting of its shareholders for the purpose of availing itself of the privileges and provisions of this chapter, or for increasing or diminishing the amount of its capital stock, or for extending or changing its business, or the length of its corporate life, the directors shall publish a notice, in a newspaper published in the county or city, if any shall be published therein, and mail a copy of such notice, postage prepaid, addressed to each stockholder at his usual place of residence.

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"2. The notice shall be signed by at least a majority of the directors, and shall specify the object and time and place of the meeting and the proposed changes.

"3. The notice shall be published at least sixty days prior to the meeting and once a week after the first publication. It shall be mailed at least sixty days prior to the meeting."

While Section 363.500 RSMo 1949, quoted supra, is contained in Chapter 363 RSMo 1949, the law particularly applicable to trust companies, it must be viewed as a law of general application to trust companies when we consider Sections 363.770 to 363.970, of the same Chapter 363, setting up a special procedure for merger of trust companies. At this point, we cite language found at 82 C.J.S., Statutes, Sec. 369:

"For purposes of interpretation, legislative enactments have long been classed as either general or special, and given different effect on other enactments dependent as they are found to fall into one class or the other. Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true a fortiori when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage."

The foregoing quotation from text of 82 C.J.S., Statutes, is well supported by language found in *State v. Richman*, 347 Mo. 595, 1.c. 601, 148 S.W.(2d) 796, as follows:

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"In State v. Harris, 337 Mo. 1052, 1058, 87 S.W.(2d) 1026, we said that if statutes are necessarily inconsistent that which deals with the common subject matter in a minute and particular way will prevail over one of a more general nature; * * *."

A reading of Sections 363.500 and 363.840 RSMo 1949 in relation to the subject of notice to stockholders points up a patent repugnancy. Under Section 363.840 RSMo 1949 of the merger procedure, it is mandatory that stockholders act on the plan of merger within sixty days after approval of said plan by the Commissioner of Finance. Under Section 363.500 RSMo 1949, a trust company desiring to avail itself of any of the privileges enumerated in Chapter 363 RSMo 1949 applicable to trust companies, must publish a notice of stockholders' meeting sixty days prior to the meeting. It is impossible to meet the publication requirement found in Section 363.500 RSMo 1949, within the prescribed time made mandatory by Section 363.840 RSMo 1949, and therein we find repugnancy. For this reason it must be concluded that publication of notice to stockholders as required by Section 363.840 RSMo 1949, whereby a merger of banking institutions is to be effected, is to be followed in lieu of notice required by Section 363.500 RSMo 1949.

CONCLUSION

It is the opinion of this office that notice to stockholders, as required by Section 363.840 RSMo 1949, whereby a merger of banking institutions is to be effected, is to be followed in lieu of notice required by Section 363.500 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

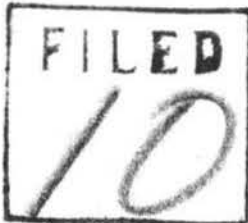
Yours very truly,

John M. Dalton
Attorney General

JLO:M:cm

MUNICIPALITIES:
LEASES:

A lease consummated by city officials who have a pecuniary interest in it comes within the purview of Section 106.300, RSMo 1949.



May 15, 1958

Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Some of the members of the newly elected city officials of Clarence, Missouri, have requested me to write you asking for an opinion on the following:

"On April 14, 1958, the outgoing administration of the city of Clarence has passed an ordinance No. 95, a copy of which is herewith enclosed.

"Immediately thereafter and on the same date, the outgoing Mayor and City Clerk entered into a lease with the Clarence Lake Development Association, Inc.

"The Board of Directors of the Clarence Lake Development Association, Inc. are: B. L. Edrington, Morris Eisenberg, Faye Tils, Robert L. McCollun, Ralph E. Tucker, Yovette Wood, Charles White, and Charles Jennings.

"Of the Board of Directors of this Corporation, B. L. Edrington was outgoing Mayor of

Honorable Rolin T. Boulware

Clarence, and Morris Eisenberg, Faye Tils, and Charles White were members of the Board of Aldermen of the outgoing administration, however Charles White, as Alderman, voted against passing the Ordinance, and also made the statement that he was not a member of the Board of Directors of the Corporation, although the record filed in the Recorder's office of the Articles of Incorporation lists him as one of the first Board of Directors of said Corporation. The other two members of the Board of Aldermen voted for the Ordinance and the Mayor approved the Ordinance, and Morris Eisenberg, one of the outgoing Alderman, signed the lease, as the President of the Corporation.

"The members of the newly elected officers of the city of Clarence, who have not yet gone into office, want an opinion as to whether the lease is a valid lease under the laws of the State of Missouri.

"The members of the Board of Aldermen that talked to me said that their attention had been called to Section 106.300 of the Revised Statutes of Missouri, and they, after reading the same, were of the opinion that the lease would not be a valid lease, and they wanted an opinion from your office on this question."

The fact situation which you present is one which involves two separate bodies, to wit, the City of Clarence and the Clarence Lake Development Association, Inc. Officers of these two bodies are, to a degree, identical, or were so at the time the contract here in issue was consummated. The Mayor of Clarence, B. L. Edrington, and two members of the board of aldermen, Morris Eisenberg, and Faye Tils, were also members of the Board of Directors of the Clarence Lake Development Association, Inc. Eisenberg was, in fact, president of the Lake Development Association. The lease was by the City of Clarence to the Lake Development Association. Edrington signed as Mayor of Clarence and Eisenberg as president of the Lake Development Association.

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Charles White was a member of the board of aldermen and was listed as being on the board of directors of the Lake Development Association. However, he denied that this was true and voted against the ordinance here in question.

The Clarence Lake Development Association is a nonprofit corporation. The consideration paid by the Association to the City of Clarence was purely nominal, to wit, the sum of \$10 for a five year lease.

The question which is presented by this situation is whether the action that was taken is in violation of the law because of the fact that three of the city officials of Clarence were at the same time officials of the Clarence Lake Development Association.

In regard to this matter we direct attention to Section 106.300 RSMo 1949 which reads:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the facts to the council, whereupon the council, as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council, he be found so interested, he shall be immediately dismissed from such office."

It will be noted that this section states that if any city officer "shall be directly or indirectly interested in any contract under the city" he shall be deemed guilty of a misdemeanor.

Our problem here is to determine the meaning of the words "interested in." This issue resolves itself into a question of whether such interest, within the meaning of the statute, is solely pecuniary. If, as we believe, the term means a pecuniary interest only, our field of investigation will be greatly narrowed. This issue resolves itself into a question of whether such interest, within the meaning of the statute, is solely pecuniary.

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Let us now attempt to determine whether the "interest" contemplated by Section 106.300 supra, is solely pecuniary.

In the case of State v. White, 282 S.W. 147, a 1926 case, a donor had bequeathed to the City of Mexico the sum of \$1,000 for the erection of a drinking fountain on the public square. Subsequently, the city passed an ordinance accepting the gift and providing for the erection of the fountain at a particular spot on the courthouse lawn. At l.c. 148 the St. Louis Court of Appeals stated:

"At the time the ordinance was passed and the contract was entered into for the erection of the fountain, Mayor Gallaher was a partner of the relator in the marble business. The name of the partnership was James W. Gallaher & Co. That this partnership existed as stated was conceded, and the learned chancellor found that Gallaher, as a member of said partnership, was directly interested in the contract for the erection of the fountain. There was abundant evidence to support this finding.

"The charter of the City of Mexico (section 8237, Revised Statutes 1919), provides that, 'if any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor,' and section 3665, Revised Statutes 1919 contains the same provision. There ought to be no question that the contract involved here is within the purview of these sections of the statute. Though the contract relates to a gift to the city in trust for the specific purpose of erecting a drinking fountain, nevertheless the contract was a contract under the city, and the work of erecting the fountain was a work done by the city, within the meaning of these sections. This being so, the contract was illegal and void. As mayor of the city, Gallaher had the superintending control of all the officers and affairs of the city, and it was his duty to see that the ordinances of the city and

Honorable Rolin T. Boulware

the state laws relating to the city were complied with. It was his duty to preside over the council and cast the deciding vote in case of a tie. He also had the power to veto any ordinance, resolution, or order of the council. As mayor he approved the ordinance providing for the erection of the fountain, had the plans drawn therefor, appointed a committee to get bids on the work, approved the award of the work to the relator, and signed the written contract therefor on behalf of the city. His direct interest in the contract as a partner of relator was found by the chancellor, to whose finding we ought and do defer. The contract was *malum prohibitum* if not *malum in se*. Equity will not assist a party to reap the rewards of a contract prohibited by the statute. It will not compel an officer to become a party to an illegal transaction against his will. *Berka v. Woodward*, 57 P. 777, 125 Cal. 119, 45 L.R.A. 420, loc. cit. 423, 73 Am. St. Rep. 31; *Downing v. Ringer*, 7 Mo. 585; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Kitchen v. Greenabaum*, 61 Mo. 110; *Haggerty v. St. Louis Ice Manufacturing & Storage Co.*, 44 S.W. 1114, 143 Mo. 238, 40 L.R.A. 151, 65 Am. St. Rep. 647; *O'Bannon v. Wydick*, 220 S.W. 853, 281 Mo. 478; *Sprague v. Rooney*, 16 S.W. 505, 104 Mo. 349, loc. cit. 358; *State ex rel. Connecticut Fire Ins. Co. v. Cox*, 268 S.W. 87, 306 Mo. 537, 37 A.L.R. 1456."

In the case of *Githens v. Butler County*, 165 S.W. 2d 650, the wife of a judge of the county court purchased land which was ordered sold by the county court, in which order the husband participated. At l.c. 652 the Missouri Supreme Court stated:

" * * * The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their

Honorable Rolin T. Boulware

number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, § 1735, p. 4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S.W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of [or] council. * * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial. * * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, § 773; 46 C. J. § 308; 22 R. C. L. § 121; State ex rel. Streif v. White, Mo. App. 282 S.W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S. W. 2d 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857."

We call especial attention to the statement of the court that "in general, the disqualifying interest must be of a pecuniary or proprietary nature."

Honorable Rolin T. Boulware

In the case of Polk Tp. Sullivan County v. Spencer, 259 S.W. 2d 804, the action was by a township board against a former member to recover such amount paid such member under a contract to work on township roads while he was a member of the board. At l.c. 806 the Missouri Supreme Court stated:

"* * * Spencer was employed by the board, not a road overseer, and the board is expressly authorized to contract and to employ operators 'and * * * necessary help and do such work by day labor.' Section 229.040, RSMo 1949, V.A.M.S. In Nodaway County v. Kidder, supra, in addition to the county judge's contract being against public policy, the statutes under which he held office expressly provided that 'No judge of any county court in the state shall, directly or indirectly, become a party to any contract to which such county is a party, or to act as any road or bridge commissioner, * * *.' Section 49.140, RSMo 1949, V.A.M.S.; Githens v. Butler County, 350 Mo. 295, 165 S.W. 2d 650. Likewise, in 1899, the statutes relating to drainage districts provided that 'said commissioners shall not, during their term of office, be interested, directly or indirectly, in any contract for the construction of any ditch, * * * nor in the wages of or supplies to men or teams employed on any such work in said district.' St. 1899, § 8336. Consequently, it was held that a contract by which one of the commissioners was employed as the engineer to supervise the construction of a levee and drainage ditch was void, and that he could not recover upon the warrants issued in payment of his contracted services. Seaman v. Cap-Au-Gris Levee Dist., supra; annotation 140 A.L.R. 583. The force and significance of the absence of the statutory prohibition and the presence of the authority to contract in general is that the employment contract is not void, but voidable. * * *"

The above appear to be the leading cases in Missouri. We have examined numerous other cases in other jurisdictions, in all of which the statutory prohibition was substantially similar to that in Missouri, to wit, Section 106.300. Some of these cases are: Commonwealth ex rel. Gardner v. Elliott, 291 Pa. 98;

Honorable Rolin T. Boulware

Gillen v. City of Milwaukee, 183 N.W. 679; City of Northport v. Northport Town Site Company 68 P. 204 and numerous others. In all of these cases, both within and without Missouri, we have found none in which the "interest" in issue was not a pecuniary interest.

Whether the city officials of Clarence, who also were members of the Clarence Lake Development Association, Inc., had a pecuniary interest in the lease in question, can only be determined from a careful weighing of numerous facts with which you are much more familiar than are we. We do say that if the city officials had a pecuniary interest in the lease they were in violation of Section 106.300 supra, and that if they did not have a pecuniary interest, that they were not.

CONCLUSION

It is the opinion of this department that a lease consummated by city officials who have a pecuniary interest in it comes within the purview of Section 106.300 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

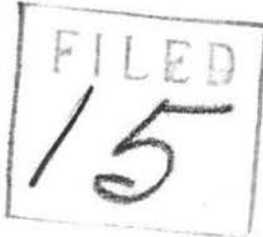
Yours very truly,

John M. Dalton
Attorney General

HPW:vlw

JUVENILE OFFICERS:
JUVENILE COURTS:
CIRCUIT COURTS:
THIRD AND FOURTH CLASS
COUNTIES:

In circuits consisting of third and fourth class counties, juvenile officers must be appointed for entire circuit or two or more circuits, rather than for individual counties.



January 13, 1958

Honorable William J. Cason
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Cason:

This refers to your request for an opinion concerning certain provisions of the so-called New Juvenile Code, Sections 211.351 and 211.391, RSMo Cum. Supp. 1957, which request reads, in part, as follows:

"The first section noted provides for the appointment of a juvenile officer in counties of the first, second, third and fourth class and provides for their compensation. I would like to know if it would be within the discretion of a Circuit Judge of a circuit containing counties of the third and fourth class to designate a juvenile officer for each individual county in his circuit providing the total compensation to be paid the respective officers would not exceed the sum of \$5,000."

Section 211.351, RSMo Cum. Supp. 1957, reads as follows:

"1. The juvenile court shall appoint a juvenile officer and other necessary juvenile court personnel to serve under the direction of the court in each county of the first and second class and the circuit judge in circuits comprised of third and fourth class counties

"(1) may appoint a juvenile officer and other necessary personnel to serve the judicial circuit;
or

"(2) circuit judges of any two or more adjoining circuits may by agreement, confirmed by judicial order, appoint a juvenile officer and other necessary personnel to serve their respective judicial circuits and in such a case the juvenile officers and other persons appointed shall serve under the joint direction of the judges so agreeing.

Honorable William J Cason

"2. In the event a juvenile officer and other juvenile court personnel are appointed to serve as provided in subdivisions (1) and (2) of subsection 1, the total cost to the counties for the compensation of these persons shall be prorated among the several counties and upon a ratio to be determined by a comparison of the respective populations of the counties."

Section 211.391, RSMo Cum. Supp. 1957, insofar as it relates to circuits consisting of third and fourth class counties, reads as follows:

"1. In counties of second class and in those judicial circuits comprised of counties of the third and fourth classes, the employees of the juvenile court shall receive as compensation annual salaries not to exceed the following amounts:

"(1) Juvenile officer, five thousand dollars;

"(2) Chief deputy juvenile officer, four thousand four hundred dollars;

"(3) Deputy juvenile officers, three thousand eight hundred dollars;

"(4) Secretaries and stenographers, three thousand dollars; and

"(5) Clerks and typist, two thousand one hundred dollars.

"2. Actual expenses, including a mileage allowance not to exceed that amount allowed state officers for each mile traveled on official business but exclusive of office expense, incurred by the juvenile officer and deputy juvenile officers while in the performance of their official duties shall be reimbursed to them out of the funds of the county or counties.

* * * * *

"4. The salaries and expenses of juvenile officers and other juvenile court personnel serving two or more counties of the third and fourth classes which comprise one or more judicial circuits are payable

Honorable William J. Cason

out of county funds and prorated among the several counties served upon a ratio determined by a comparison of the respective populations of the county."

With respect to the appointment of juvenile court personnel in circuits consisting of third and fourth class counties, subsection 1 of Section 211.351, provides for the appointment by a circuit judge of "a juvenile officer and other necessary personnel to serve the judicial circuit" or for the appointment by the circuit judges of two or more adjoining circuits of "a juvenile officer and other necessary personnel to serve their respective judicial circuits."

Subsection 2 of Section 211.351 and subsection 4 of Section 211.391 require that the salaries and expenses of the juvenile court personnel so appointed be prorated between the counties of the circuit or circuits served by such personnel on the basis of the population of the respective counties.

Subsection 1 of Section 211.391 provides that in circuits comprised of counties of the third and fourth classes the annual salary of the juvenile officer shall not exceed \$5,000.00; and it fixes maximum salaries for various classes of subordinate juvenile court personnel in such circuits. No limitation on the total compensation of all such personnel within a circuit is prescribed.

Construing subsection 1 of Section 211.351 literally, and considering the pattern set by the various pertinent statutory provisions, it seems clear that the law contemplates that, in circuits consisting of third and fourth class counties, juvenile court personnel shall be appointed for a circuit (or for two or more circuits), rather than for individual counties, and that there shall be a single juvenile officer, and such subordinate personnel as may be necessary, to serve an entire circuit (or circuits).

The fact that it is not the intent of the law that a juvenile officer shall be appointed for each individual county within such a circuit is emphasized by the legislative history of the pertinent statutory provisions. These provisions were enacted as part of Senate Bill No. 15, 69th General Assembly. As originally introduced, the bill contained the following provisions concerning the appointment of juvenile court personnel:

"211.340. 1. The juvenile court shall appoint a juvenile officer and other necessary juvenile court personnel to serve under the direction of the court in each county in the judicial circuit except that in counties where such appointments

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are deemed impracticable for any reason:

"(1) The juvenile court may appoint a juvenile officer and other necessary personnel to serve two or more counties in the judicial circuit; or

"(2) Circuit judges of any two or more adjoining circuits may by agreement, confirmed by judicial order, appoint a juvenile officer and other necessary personnel to serve their respective judicial circuits and in such a case the juvenile officers and other persons appointed shall serve under the joint direction of the judges so agreeing."

The original bill thus expressly provided for the appointment of a juvenile officer and other necessary personnel in each county, subject to an exception which permitted appointments of personnel to serve two or more counties where appointments on a single county basis were deemed impracticable. During the course of the passage of the bill, however, this provision was amended to read as it now does in subsection 1 of Section 211.351. From a comparison of the original provision and the one finally enacted, it is apparent that the sole purpose of the amendment was to eliminate the authority for appointments on a single county basis in circuits consisting of third and fourth class counties and to provide only for appointments for entire circuits or for two or more circuits.

CONCLUSION

Upon the basis of the foregoing, it is the opinion of this office that Section 211.351, RSMo Cum. Supp. 1957, does not authorize the appointment of a juvenile officer for each individual county in a judicial circuit consisting of third and fourth class counties, and that, instead, such officer must be appointed to serve an entire circuit or two or more circuits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John C. Baumann.

JCB:mv

Yours very truly,

John M. Dalton
Attorney General

SAFETY RESPONSIBILITY UNIT: (1) A person who has only a chauffeur's
DRIVER'S LICENSE: license and who has his license suspended,
CHAUFFEUR'S LICENSE: and is required by law to furnish proof
of financial responsibility should have
his chauffeur's license returned to him upon furnishing proof of
financial responsibility on all vehicles owned by him. (2) A per-
son who has his license suspended and is required to maintain proof
of financial responsibility and for whom there is filed proof of
financial responsibility on one specific vehicle by a proper person
under the terms of Section 303.250, should have his license, either
operator's, chauffeur's or both, returned to him with a notation
on the face of the license that said license is restricted to driv-
ing the particular vehicles for which proof was furnished.

FILED

15

June 6, 1958

Mr. L. G. Cass
Supervisor, Safety Responsibility Unit
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Cass:

You recently requested an opinion on the following subject:

"If a subject has only a chauffeur's license issued to him, if his driving privileges are suspended and the chauffeur's license is surrendered to this office, and if a Form SR-22 is filed showing that the subject has insurance coverage for only his privately owned vehicle, could his driving privileges be reinstated and he be notified that he could apply for an operator's license, but that his chauffeur's license could not be returned until such time as proof of financial responsibility relevant to the vehicle or vehicles which he would operate while using said license is filed with this Unit.

We also request an opinion as to the return of an operator's and chauffeur's license under Section 303.250 where a Form SR-22A is filed for a subject by the owner of one specific vehicle."

For clarity we set out Section 303.020, RSMo Cum. Supp. 1957, subsections 4 and 11, which is a part of the definition section

Mr. L. G. Cass

of the Safety Responsibility Law, and defines license and registration as follows:

"'License', an operator's or driver's license, temporary instruction permit, chauffeur's or registered operator's license issued under the laws of this state;

"'Registration', registration certificate or certificates and registration plates issued under the laws of this state pertaining to the registration of motor vehicles;"

We also set out Section 303.150, RSMo Cum. Supp. subparagraphs 1 and 2 as follows:

"1. Whenever the director, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the director shall also suspend the registration for all motor vehicles registered in the name of such person except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

"2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed, nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person, until permitted under the motor vehicle laws of this state, and not then unless and until he shall give and thereafter maintain proof of financial responsibility."

Section 303.160, paragraph 1 and subparagraph 1 read:

"1. Proof of financial responsibility when required under this chapter with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle may be given by filing:

Mr. L. G. Cass

"(1) A certificate of insurance as provided in section 303.090 or section 303.170; or"

Section 303.170, reads:

"1. Proof of financial responsibility may be furnished by filing with the director the written certificate of any insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

"2. No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such motor vehicle is so designated in such a certificate."

We assume that the situation referred to arises when a person who holds only a chauffeur's license has his license revoked or suspended due to convictions or due to an unsatisfied judgment and the period of revocation or suspension has passed. The person then supplies your division with a properly authorized form stating that the person has insurance on a privately owned vehicle (your Form SR-22). No proof is offered, however, for commercial vehicles which may be driven by the person but which are not owned by him. Your question then is whether, under these circumstances, you may keep the chauffeur's license and request the individual to apply for a driver's license.

We believe that this procedure is improper. The definition section of the Safety Responsibility Law clearly treats drivers' licenses and chauffeurs' licenses as being covered under the term license. A person who has his license suspended for convictions or because of an unsatisfied judgment under the law must maintain future proof of financial responsibility for all motor vehicles owned by him before his license may be returned. He may do this by supplying proper certificates of insurance indicating that insurance is in force on all of his vehicles.

Mr. L. G. Cass

See Sections 303.160, RSMo Cum. Supp. 1957 and 303.170. But when the return of his license is allowed by law and when proper proof of financial responsibility is filed with your Unit, then the license of the person is to be returned. License, as before stated, under this Law, means operator's and chauffeur's license. It is further noted in this regard that no authority is given under the law for the Director of Revenue to request a person who has a chauffeur's license to secure a driver's license before his driving privileges will be restored.

We feel, therefore, that when the return of the license is permitted by law and when the person submits proper proof of financial responsibility for all vehicles owned by him, his license, and this term includes chauffeur's license, must be returned to him.

As for your second question, Section 303.250, RSMo Cum. Supp. 1957, reads as follows:

"Whenever any person required to give proof of financial responsibility hereunder is or later becomes an operator in the employ of any owner, or is or later becomes a member of the immediate family or household of the owner, the director shall accept proof given by such owner in lieu of proof by such other person to permit such other person to operate a motor vehicle for which the owner has given proof as herein provided. The director shall designate the restrictions imposed by this section on the face of such person's license."

Your form SR-22A is a form which certifies that there is insurance on a certain vehicle which will be used by the revoked licensee. When this form is filed by someone enumerated in the above cited statute, the Director designates the restrictions to be placed on the license and returns the license to the revoked license holder. A question might arise as to what restrictions the Director may properly impose on the face of the license. We feel that this is answered by the language of the statute which says, in part: "To permit such other person to operate a motor vehicle for which the owner has given proof as herein required." This, we feel, restricts the revoked licensee to driving only the car for which proof has been afforded. The Director should properly note on the license of the person that he is restricted to driving this certain specific vehicle. The license with such notation should then be returned to the licensee. License, of course, in this instance, also means chauffeur's license, operator's license, or both.

Mr. L. G. Cass

CONCLUSION

It is the opinion of this office that:

(1) A person who has only a chauffeur's license and who has his license suspended, and is required by law to furnish proof of financial responsibility should have his chauffeur's license returned to him upon furnishing proof of financial responsibility on all vehicles owned by him.

(2) A person who has his license suspended and is required to maintain proof of financial responsibility and for whom there is filed proof of financial responsibility on one specific vehicle by a proper person under the terms of Section 303.250, should have his license, either operator's, chauffeur's, or both, returned to him with a notation on the face of the license that said license is restricted to driving the particular vehicle for which proof was furnished.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. James E. Conway.

Very truly yours,

JOHN M. DALTON
Attorney General

JEC: mw
mjb

PREVAILING WAGE LAW: Construction work done by a public body upon public works comes within the purview of the Prevailing Wage law, regardless of the source of the funds used in such work, and, conversely, where work is not done by a public body it does not come within the purview of the Prevailing Wage law.



December 17, 1958

Mr. Charles E. Cates
Commissioner
Industrial Commission of Missouri
State Office Building
Jefferson City, Missouri

Dear Mr. Cates:

This will acknowledge receipt of your recent request for an official opinion of this office under date of November 17, 1958. Your letter reads:

"Recently I have been asked some questions pertaining to hospital construction and I would like an opinion of whether or not a hospital not being constructed by State Funds, but being constructed by both public subscription and funds under the Hill-Burton Act, would come under the Missouri Prevailing Wage Law."

Subsequent to our receiving your request, you have informed us that you would like to have an opinion based upon the assumption of two sets of facts. One of these is a situation in which the employing agency is the state or any political subdivision thereof, and one in which the employing agency is a group of private individuals.

The policy of the state with respect to the Prevailing Wage law is set forth in Sections 290.220 and 290.230, RSMo, Cum. Supp. 1957. These sections read:

Section 290.220.

"It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate

Mr. Charles E. Cates

of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work."

Section 290.230.

"1. Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work. Only such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works.

"2. When the hauling of materials or equipment includes some phase of construction other than the mere transportation to the site of the construction, workmen engaged in this dual capacity shall be deemed employed directly on public works."

From the above, it will be noted that this law applies only in situations where a public body is engaged in public works. These two terms, "public body" and "public works," are defined in numbered paragraphs 6 and 7 of Section 290.210, RSMo, Cum. Supp. 1957, and read:

"(6) 'Public body' means the state of Missouri or any officer, board or commission of the state, or other political subdivision;

"(7) 'Public works' means all fixed works constructed for public use except work done directly by any public utility company pursuant to order of the public service commission or other public authority whether

Mr. Charles E. Cates

or not done under public supervision or direction or paid for wholly or in part out of public funds; it does not include any work done for or by any drainage or levee district."

It will be noted that a "public body" means the state or any political subdivision thereof. If the hospital in question is being built by a political subdivision, then the operation would come under the Prevailing Wage law.

If, on the other hand, this is not a project by a political subdivision, but is purely private, then it would not come under the Prevailing Wage law because the operation would not be by a "public body" as that term is defined in numbered paragraph 6, supra, and only public works constructed by a public body come within the purview of the law.

CONCLUSION

It is the opinion of this department that construction work done by a public body upon public works comes within the purview of the Prevailing Wage law, regardless of the source of the funds used in such work, and, conversely, that where the work is not done by a public body it does not come within the purview of the Prevailing Wage law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ml

CONSERVATION COMMISSION: Authority of agent to require aid, or deputize, in execution of process.



March 14, 1958

Honorable David L. Colson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Colson:

Your recent request for a legal opinion of this office has been received and such request reads as follows:

"The conservation agent assigned to St. Francois County has raised an important question concerning the power of a conservation agent to deputize men to aid him in making an arrest. Section 252.080, Mo. Rev. Statutes 1949, gives the same power to an authorized agent to serve criminal process as sheriffs and marshals and also have the same right as sheriffs and marshals to request aid in the execution of such process. This section taken in connection with Section 105.210, Mo. Rev. Statutes 1949, seems to give the conservation agent the authority to deputize citizens to aid him in making an arrest.

"In particular, the question arises as to whether he has the authority to summon aid to help him make an arrest of a person violating the fish and game laws of the State of Missouri."

Section 252.080, RSMo 1949, is as follows:

"Every authorized agent of the commission shall have the same power to serve criminal process as sheriffs and marshals, only in such cases as are violations of this law and rules and

Honorable David L. Colson

regulations of the commission, and have the same right as sheriffs and marshals to require aid in the execution of such process. Any such agent may arrest, without warrant, any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this law or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases."

It is our opinion that in accordance with the terms of the above statute every authorized commission agent of the Conservation Commission, as established by the Constitution of Missouri, has the same right as sheriffs to require aid in the execution of process. However, this right to require aid in the execution of process is limited to circumstances, situations, or cases, in which there are violations of Chapter 252, RSMo 1949, Fish and Game, and violations of the rules and regulations of the Conservation Commission of Missouri.

When it is determined that there is a violation of the fish and game laws, Sections 57.110 and 105.210, RSMo 1949, would also be applicable in determining additional qualifications and limitations to the right of the conservation agent to require aid in the execution of process.

CONCLUSION

It is our opinion that a Conservation Commission agent has the same right as sheriffs and marshals to require aid in the execution of process when there are violations of the fish and game statutes, and the rules and regulations of the Conservation Commission of Missouri.

Yours very truly,

John M. Dalton
Attorney General

JBS:mw

MOTOR VEHICLE LICENSE
APPLICATIONS:
COLLECTOR TO ISSUE RECEIPT
OR STATEMENT TANGIBLE PERSON-
AL PROPERTY TAXES ARE PAID,
EVEN IF MERCHANT'S TAX IS DE-
LINQUENT:

One who pays all tangible per-
sonal property taxes assessed
against him for preceding year,
is entitled to tax receipt or,
on request, to collector's cert-
ified statement showing taxes paid,
even though party owes delinquent
merchant's tax. Upon proper appli-
cation for motor vehicle license,

accompanied by such tax receipt or collector's statement, in
accordance with Sec. 301.025, RSMo Cum. Supp. 1957, party en-
titled to receive license although merchant's tax is delinquent.



July 21, 1958

Honorable J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Colley:

This is to acknowledge receipt of your request for our
legal opinion, which reads, in part, as follows:

"The County Treasurer also has this problem in
Dade County. It seems that a wife has the title
to an automobile in her name. The personal prop-
erty belonging to the husband and the automobile
in the name of the wife is given to the tax as-
sessor all in the husband's name. The husband
does not pay the personal property tax. The wife
demands a statement from the County Treasurer to
the effect that she owes no personal property tax.
By the use of this statement she purchases a li-
cense plate for the automobile.

"It seems to me as if Section 301.025, of the Mis-
souri Statute, 1945, requires that the personal
property tax actually be paid before the owner can
legally purchase the license plate.

"A similar proposition has arisen. The owner of
a business owes personal property tax on the per-
sonal property assessed to his business. He also
has an automobile and other personal property as-
sessed against him. He pays the personal property
tax on the personal property which includes his
automobile but is delinquent on the personal prop-
erty tax covering his business. The County Treas-
urer wants to know whether or not such a party is
entitled to secure a license plate on his automo-
bile merely by paying part of the personal property
tax that he owes."

Honorable J. W. Colley

An opinion of this department written for Honorable Harold W. Barrick, Prosecuting Attorney of Pettis County, on July 31, 1953, concludes that unassessed personal property may not be added to the tax books after October 31st, by assessor, collector or county court, and, therefore, a person whose property was not assessed is entitled to a statement that no taxes were owed by him. The county of residence on January 1st is the county from which statement regarding personal property tax liability must be obtained for use under Section 301.025, RSM Cum. Supp. 1957.

Also, in an opinion of this department written for Honorable Haskell Holman, State Auditor, on October 5, 1953, it was concluded that where a husband and a wife each own personal property individually, such property should be assessed to each one individually.

It is believed the above-mentioned opinions fully answer the third inquiry, and copies of same are enclosed for your consideration.

For purposes of taxation, all property in Missouri has been classified as (1) real property, (2) tangible personal property, and (3) intangible personal property. Tangible personal property has been defined by paragraph 3, Section 137.010, RSMo 1949, "includes every tangible thing being the subject of ownership or part ownership, whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined."

From this statutory classification of property for tax purposes, it appears that merchandise would be tangible personal property. Yet, this type of property is not assessed and taxed as other kinds of tangible personal property. Chapter 150, RSMo 1949, provides a separate method for the taxation of merchandise, which will be presently seen from different sections of said chapter.

While the issue in the case of *Ex rel. v. Alt*, 224 Mo., 493, was whether merchants are liable for a property tax or merely a license permitting them to sell merchandise, the court called attention to the special method of taxing merchandise and, at 1.c. 507-508, said:

"* * * In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay an ad valorem tax equal to that which is levied upon

Honorable J. W. Colley

real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied."

Section 150.020, RSMo 1949, construes the term "merchant" and reads:

"The term 'merchant' as used in sections 150.010 to 150.290, shall be construed to include all merchants, commission merchants, grocers, manufacturer and dealers in drugs and medicines, except physicians for medicines used in their practice, whether trading as wholesale or retail dealers."

Section 150.040, RSMo 1949, requires the merchant to pay an advalorem tax, annually, on merchandise in the amount specified by said section, which reads:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Section 150.050, RSMo 1949, requires the merchant to deliver a statement of the greatest amount of merchandise on hand at any time between the first Monday in January and the first Monday in April next preceding, which statement shall be furnished the assessor on the first Monday in May each year, except in counties under township organization (par.4). The statement shall be made by the township assessor, who shall deliver it to the clerk of the county court, who, in turn, shall deliver it to the county board of equalization on the second Monday of July each year.

Honorable J. W. Colley

The statement furnished the assessor is the basis for the assessment of merchants' taxes, since the merchandise is not to be listed on a regular assessment blank with other real and personal property of the taxpayer. While the tax is an ad valorem tax on the merchandise, it is in the nature of a license tax authorizing the merchant to sell goods for the year in which it is issued. The merchant is subject to criminal prosecution if he engages in business without first obtaining the license, and must furnish a bond in favor of the state to secure the payment of the tax in every instance, except when he has paid the license tax for five consecutive years preceding his application. All of these characteristics of the merchants' tax given in the applicable statutes referred to, set it apart from all other taxes of tangible personal property taxes, to such an extent that, while such property thus taxed may technically fall within the general classification of tangible personal property, it is not ordinarily considered such for tax purposes, and is not to be included within the plain or ordinary meaning of the term "tangible personal property tax."

We believe this usage is shown by the manner in which the terms are referred to in that part of Sec. 301.025, RSMo Cum. Supp. 1957, we have underscored, which reads:

"No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicant's property was assessed showing that the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes were due. Every county and township collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this section, and shall design all necessary forms." (Emphasis ours).

It appears there is no indication the legislative intent was to give the language used in this section some special or technical meaning, consequently, it must be assumed the legislative intent was to give such language its plain or ordinary usage, and this would particularly be true of the words "tangible personal property."

In view of the fact that the assessment of tangible personal property, referred to in the section, undoubtedly refers to such property as is assessed in the usual manner and not to that tangible personal property which happens to be merchandise. There-

Honorable J. W. Colley

fore, we conclude the legislative intent was not to include merchandise in the general terms "tangible personal property taxes" used in this section.

From the facts given in the fourth inquiry of the opinion request, it appears that the person operating the drugstore is a merchant within the meaning of Sections 150.010 and 150.020, defining merchants, and is liable for the payment of the merchants' tax under the provisions of Section 150.040, supra. It does not appear he has filed the statement required with the county assessor, but we will assume that the statement has been filed. We are informed that the "tax assessed to his business", which is construed as referring to a merchant's tax, is delinquent. The party has other personal property, including an automobile assessed to him, and he has "paid the part of his personal property tax which includes his automobile". By this, we understand the person has paid all tangible personal property taxes assessed to him, except the merchant's tax.

We are uninformed as to whether or not the county treasurer and ex officio collector issued the tax receipt to the drugstore operator. It was the duty of the treasurer to issue a tax receipt to the taxpayer, if this has not already been done, because the issuance of the tax receipt could not be delayed until the merchant's tax had been paid. In the event the merchant's tax was not paid at the same time as the other personal property tax, and was still delinquent, then it became the duty of the treasurer to proceed against the drugstore operator in an effort to collect the merchant's tax by the only method which could be followed in such instance and which is set out in Sections 150.230, 150.240, 150.270 and 150.280.

Therefore, in answer to your fourth inquiry, it is our thought that, since the taxpayer has paid all tangible personal property taxes assessed against him for the preceding year, it is immaterial that he owes delinquent merchant taxes, and it is the duty of the treasurer and ex officio collector of Dade County to issue a receipt showing payment of such taxes, or at the request of the taxpayer, to issue a certified statement showing said taxes have been paid. Upon making application for license to operate a motor vehicle in Missouri and forwarding the tax receipt or certified statement with his application for license, in accordance with Section 301.025, RSMo Cum. Supp. 1957, said taxpayer is entitled to receive a license plate for his automobile.

CONCLUSION

Therefore, it is the opinion of this department that when one pays all tangible personal property taxes assessed against him for the preceding year he is entitled to receive a tax re-

Honorable J. W. Colley

ceipt or, upon request, a certified statement of the county or township collector showing payment of said taxes, regardless of the fact that at such time the taxpayer owes delinquent merchant taxes. If the taxpayer makes a proper application for registration license to operate a motor vehicle in this state, and said tax receipt or certified statement of the county or township collector, showing tangible personal property taxes paid for the preceding year, accompany the application, as required by Section 301.025, RSMo Cum. Supp. 1957, the taxpayer is entitled to receive such license, although his merchant's tax is delinquent at such time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

Encs. Opinions to
Haskell Holman;
Harold W. Barrick.

SCHOOL DISTRICTS: After the Hart Consolidated School District
ANNEXATION: conducted a special election for the purpose
MANDAMUS: of annexing to the City of Anderson Consolidated School District, and after which the Secretary of the Hart Consolidated School District failed to certify the results of said election to the Anderson Consolidated School District, and subsequently the Anderson Consolidated School District, under the laws of Missouri became the Anderson Reorganized School District, a writ of mandamus to compel such certification of the results of said election should not be issued.

August 1, 1958



Hon. W. J. Collingsworth
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Collingsworth:

Your request for an opinion, May 14, 1958, is quoted as follows:

"I would like an opinion on the following question: Section 165.300 of the Revised Statutes of Missouri '49 provide the manner for annexation of a school district to a common city or consolidated school district. The following situation has arisen in my County.

"In February of 1958 the school board of the Hart Consolidated School District called a special election for the purpose of consolidating with the City of Anderson Consolidated School District. This election was held in March of 1958 and the vote was in favor of annexation. However, the Secretary failed to certify the results of the election to the Anderson Consolidated School District and, therefore, no further action was taken on said consolidation. On May 13, 1958 the Anderson School District was changed from a consolidated district to a reorganized district.

"The question now arises as to whether or not by mandamus the school board of the Reorganized Anderson School District can force the Secretary of the Hart Consolidated District to certify the results of the election for annexation to the Reorganized District. Or the converse of

Honorable W. J. Collingsworth

the question would be, since the annexation had not been completed while Anderson was a consolidated district, did the reorganization of the district and the dissolving of Anderson Consolidated District also dissolve any action taken toward annexation of Hart Consolidated District to Anderson Consolidated District."

It is the opinion of this office that a writ of mandamus should not be granted to compel the Secretary of the Hart Consolidated School District to certify the results of an election for annexation conducted by the Hart Consolidated School District in March of 1958 to the Anderson Reorganized School District.

We have been reminded as recently as January 16, 1958, in the case of Coffman vs. Crane, 308 S.W. 2d 451, by the Springfield Court of Appeals, that:

"The writ of mandamus being justly regarded as one of the highest writs known to our system of jurisprudence, it issues only where there is a clear and specific right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases."

We assert that in reaching our conclusion it is not necessary to determine whether the Anderson Reorganized School District is a proper party to seek the writ of mandamus, but that even if it were, the writ should not be granted. Not only does the problem confront the rights of the Anderson Reorganized School District, but it confronts the rights of the voters of the Hart Consolidated School District. We might ask ourselves:

For what purpose was the Hart election held?

Upon what issue did the voters of the Hart District vote their ballots?

To what entity did the voters of the Hart School District vote to become annexed?

We see from your letter that it was not the Anderson Reorganized

Honorable W. J. Collingsworth

School District to which the Hart School District sought to be annexed, but it was to the Anderson Consolidated School District. The voters of the Hart District have not been given the opportunity to vote on the proposition of annexation to the Anderson Reorganized District.

It is not our position that the election as conducted was invalid, but we feel that there has been such a change of circumstance, the reorganization of the Anderson School District subsequent to the election, that to compel the annexation to the new district might inject an unretractable wedge into our long established democratic processes manifested in our elective system. There is no right clearly established for which this writ of mandamus is sought to protect.

Whether the voters of the Hart Consolidated School District still prefer to annex to the Anderson Reorganized School District is not for us to speculate, nor is it for a judge to speculate. In the case of County of San Diego vs. J. C. Perrigo, November 27, 1957, 318 Pac. 2d 542, the court stated in part:

"No one knows how the voters would have reacted under such circumstances. Whether the election would have carried in the light of the facts which could be known only by events which developed subsequent to the election is a question upon which the courts will not speculate."

If the laws relating to annexation are violated to the extent that the true will and purpose of the voters cannot be carried out, or if the voters would be caused to adopt a course different from that which they would otherwise have taken, then it is our opinion that such a violation should preclude the issuance of a writ of mandamus to compel the performance of the act, the failure of which caused the violation. We direct your attention to C.J.S. page 459, Section 244, Volume 55, which states in part:

"The court may * * *, deny an application for mandamus made after an unreasonable delay, especially, or at least, where the delay has resulted, or may result, prejudicially to the rights of respondent or others interested as by misleading them or causing them to adopt a course different from that which they would otherwise have taken, * * * * *."

CONCLUSION

It is the opinion of this office that after the Hart Consolidated

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School District conducted a special election for the purpose of annexing to the City of Anderson Consolidated School District, and after which the Secretary of the Hart Consolidated School District failed to certify the results of said election to the Anderson Consolidated School District, and subsequently the Anderson Consolidated School District, under the laws of Missouri became the Anderson Reorganized School District, a writ of mandamus to compel such certification of the results of said election should not be issued.

Yours very truly,

John M. Dalton
Attorney General

JBS:mjb

CORONERS:
Special Deputies:

Jackson County Coroner is without authority to appoint "special deputy coroners" except to fill those positions created by statute.



November 21, 1958

Honorable William A. Collet
Prosecuting Attorney
Jackson County
Kansas City 6, Missouri

Dear Mr. Collet:

In your letter of September 22, 1958 you wrote as follows:

"A question has arisen here in Jackson County, concerning the practice of the Coroner of Jackson County designating certain persons as 'Special Deputies Coroners.' These persons are issued identification cards, but are paid no compensation, for any services that they may be called upon to perform. I am advised by the Coroner that in 1955, the directors of the Civil Defense in Jackson County, requested that as many as 1,000 persons be named for call and service in case of emergencies. I am further advised that approximately 100 persons have been named as Special Deputies Coroners to serve without compensation.

"I would appreciate your advice as to whether or not the appointment of the Special Deputies Coroners to serve without compensation as outlined above is authorized by law, and in fact, whether the appointment of such deputies is unlawful."

The office of coroner is not mentioned in our Constitution although it was an old common law office. Since it is in this state, at present, an office created by the Legislature, the incumbent has no powers, duties or authority except that which is prescribed by law.

Honorable William A. Collet

It is said in State ex rel. Rosenthal v. Smiley, 263 S.W. 825, 304 Mo. 549, that:

"Only the Legislature has power to create a public office (other than a constitutional office) as an instrumentality of government * * *."

See also State ex rel. Harvey v. Wright, 158 S.W. 873, 251 Mo. 325, that the Constitution, now Art. VII, Sec. 7, delegates to the Legislature the authority to provide by statute who shall make the various appointments.

"An 'office' is a privilege in gift of the state, depends on people's favor, and is a public trust because it is created in the interest and for the benefit of public."
(Motley v. Callaway County, 149 S.W.2d 875, 347 Mo. 1018.)

See 46 C.J., 1062, Section 381, regarding the status of deputies and assistants wherein it is said:

"Where * * * provision is made by statute for the position of deputy, such deputy is regarded as a public officer."

Article VII, Section 7, of the Constitution states:

"Except as provided in this Constitution, the appointment of all officers shall be made as prescribed by law."

Nothing is said in your letter regarding the duties of such "special deputies." But since our statute, Section 58.150, creates the position of a "special deputy" - class "B" - apparently any "special deputy" would be a public officer. Since, as noted above, the Constitution dictates that "the appointment of all officers shall be made as prescribed by law," no "special deputy" position may be created in any manner not prescribed.

Section 58.150 clearly creates four classes of deputies for the coroner in Jackson County. Expressly, it is stated there that the coroner shall be entitled to "* * *; at least one class 'B' special deputy * * *." If there is any necessity for extra deputies there is ample provision for them under the "class 'D' extra deputies" authorized by that section. It is expressly provided there that even these "Class 'D' extra deputies" are

Honorable William A. Collet

"to be paid not less than seven dollars nor more than nine dollars per day for such times as they may be actually employed in the discharge of their duties." See the 1955 amendment to Section 58.150, RSMo Cum. Supp. 1957. Certainly the only "special deputies" the statute mentions (those in Class "B") are paid deputies. We have searched in vain for any authority to appoint any "extra" deputies or "special" deputies who are to be "paid no compensation." In view of the above quoted provisions of law, it was necessary to create these specific deputy positions before the coroner could have the authority to appoint any of them. See also 46 C.J. 384, wherein it is said "without statutory authority deputies have no power with respect to the duty of an office involving the exercise of judgment and discretion * * *." It is certainly clear that a considerable part of the statutorily prescribed duties of the coroner consist of far more than mere ministerial functions. Many are quasi-judicial in nature and certainly require the exercise of "judgment and discretion."

Because of the nature of the coroner's duties, because under certain situations he has the authority to perform the duties of the sheriff; because he is a conservator of the peace; because he has authority to subpoena witnesses, administer oaths, and issue writs of attachment to compel the attendance of witnesses, the public is extremely interested in what persons and under what conditions any person holds any of the powers, duties, functions, privileges, etc., of this office.

A public officer cannot by contract or otherwise make over to a private person the officer's functions or powers for these are committed to the officer for the public welfare and not for private gain. See in this regard *In re Coal Tp. School Directors*, 138 A., 1.c. 750 (3), and *Motley v. Callaway Co.*, 149 S.W.2d 875, 876 (2).

We know of no reason why a request by the local Civil Defense authorities creates any authority in the coroner to make such appointments. A search of the Civil Defense Act of the state will reveal no such grant of authority.

CONCLUSION

In view of the premises, it is our opinion that the coroner is without authority to make appointments except to those

Honorable William A. Collet

offices created by statute and the offices of the "special deputies coroners" as you mentioned is not provided by statute and the appointment of some person to such is not authorized.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours,

John M. Dalton
Attorney General

RSN:hw

LEGISLATORS: STATE LEGISLATURE:
GENERAL ASSEMBLY: RETIREMENT:
STATE EMPLOYEES' RETIREMENT SYSTEM:
STATE EMPLOYEES: EMPLOYEES:
STATE OFFICERS: OFFICERS:

Members of the Legislature who have served eight or more years and who have not been refunded their accumulated contributions to the retirement fund continue as members of the system and may draw retirement benefits on reaching retirement age.



February 17, 1958

NOTE:

Section 104.380 now provides for retirement after 6 years as a legislator and payment of \$25 for each session served. - Laws 1961, p. 543

Honorable Russell Corn
Member of the Legislature
Howell County
Willow Springs, Missouri

Dear Sir:

You have recently requested an official opinion from this office on the following matter:

"I refer you to House Bill No. 188 of the 69th General Assembly, Truly Agreed to and Finally Passed.

"I would like an opinion on Section 18. In other words in my case I have served twelve years in the Legislature. In the event I do not come back and I am not sixty-five years of age, I would like an opinion whether or not I would come under this Retirement Bill.
* * *

House Bill No. 188 of the 69th General Assembly is now found in Sections 104.310 to 104.550, inclusive, RSMo 1957 Cumulative Supplement. Section 104.330 provides: "That any member who has served eight or more years as a member of the General Assembly and who has not been refunded his accumulated contributions to the fund shall continue to be a member of the system."

Section 104.380 provides that: "Each member shall retire at the end of the month during which such member shall reach normal retirement age with a normal annuity." By Section 104.310, Paragraph (21) normal retirement age is fixed at sixty-five years for all members.

Honorable Russell Corn

Section 104.390 (which is Section 18 of the bill) provides that: "The normal annuity of a member shall equal five-sixths of one percent of the average compensation of the member multiplied by the number of years of creditable service." This section goes on to make special provisions for members of the Legislature and provides: "That the minimum annuity of any member who has served eight or more years as a member of the General Assembly . . . shall consist of monthly payments made at the rate of \$10 multiplied by the number of biennial assemblies in which he has served." The section then places a maximum limit upon retirement annuities by providing that such shall never exceed two-thirds of the member's average compensation.

Thus we see that Section 104.330 provides that after a Legislator has eight years' creditable service in the Legislature he continues to be a member of the retirement system even though no longer a member of the Legislature as long as he does not apply for and receive a refund of his accumulated contributions. Section 104.380, provides that members of the system (including such ex-legislators) retire at normal retirement age, which is fixed at age sixty-five by Section 104.310 (21).

The retirement annuity of such ex-legislator is computed at a monthly payment of \$10 times the number of biennial assemblies in which the legislator has served (Section 104.390). This annuity cannot exceed two-thirds of his average compensation.

CONCLUSION

It is, therefore, on the basis of the foregoing the opinion of this office that after a Legislator has eight years' creditable service in the Legislature, he continues to be a member of the retirement system as long as he does not apply for and receive a refund of his accumulated contributions, and on reaching retirement age, which is normally sixty-five, he may retire and receive a retirement annuity of a monthly payment of \$10 times the number of biennial assemblies in which he served. Such annuity may not exceed two-thirds of his average compensation. This conclusion, of course, assumes a normal situation and it would be possible for the particular facts of any special case to bring the individual legislator within some of the special provisions of the retirement act, which are not considered here.

Honorable Russell Corn

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:vlw

MILEAGE OF CIRCUIT JUDGES:



On and after July 3, 1958, at which time Senate Bill 14, enacted by the 69th General Assembly in special session, became effective, judges of the circuit court should be reimbursed out of the state treasury for all reasonable and necessary travel expense actually incurred by them in such travel.

August 12, 1958

Honorable Claude E. Curtis
Circuit Judge
19th Judicial Circuit
Lebanon, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"In our Judicial Circuit, the Nineteenth, which consists of five counties, it has been my practice to alternate the driving with our court reporter when attending court in a county away from my place of residence. He drives his car on one trip and I drive mine on the next. When he rides with me he does not charge any mileage to the State or County and, of course, I do not charge him anything for transportation. When I ride with him I do not pay him anything for transportation.

"Under the present law, as found in Section 478.017 RSMo. 1949, and pursuant to your opinion that said Act provides for a flat mileage allowance, I have been charging the State 10¢ per mile when I ride with our court reporter.

"Senate Bill 14, passed by the 69th General Assembly, which repeals Section 478.017, and which will become effective July 3, 1958, provides

"Each judge of the circuit court whose circuit consists of more than one county, in addition to the salary provided in Section 478.013, shall be reimbursed out of the State Treasury for all reasonable and necessary travel and subsistence expenses incurred in holding of all terms of court at any place in his county or circuit other than the place of his residence."

Honorable Claude E. Curtis

"As I understand the law, we would be entitled to drive separately and each of us could charge 7¢ per mile for use of our cars, but for the sake of convenience and to save costs to the State and County we prefer to ride together.

"Will you please give me your opinion as to whether I will be entitled to any mileage when I ride with our court reporter under the same arrangement as stated above?

"Very truly yours,

S/ Claude E. Curtis

"P.S. Will you also please give me your opinion as to what amount can be properly charged per mile for reasonable travel expenses when using my own car?"

Sections 478.017 and 478.020 of Senate Bill No. 14 were enacted by the Second Extra Session of the 69th General Assembly. These sections were enacted without an emergency clause and therefore became effective 90 days after the adjournment of the Legislature. The House Journal of April 4, 1958, shows that on that date the Legislature adjourned sine die. Therefore Senate Bill No. 14 became effective on July 3, 1958. These sections read:

"478.017. Each judge of a judicial circuit composed of a single county which now has or may hereafter have less than two hundred thousand inhabitants and in which circuit court is held in more than one place and each judge of the circuit court whose circuit consists of more than one county, in addition to the salary provided in section 478.013 shall be reimbursed out of the state treasury for all reasonable and necessary travel and subsistence expenses incurred in holding of all terms of court at any place in his county or circuit other than the place of his residence, and such sum of money for said expenses shall be paid out of the state treasury in monthly installments in the same manner as salaries of such judges are paid.

"478.020. Each of the judges herein mentioned, when temporarily serving, transferred or assigned as a judge of a court other than

Honorable Claude E. Curtis

the one to which appointed or elected, said court to which temporarily assigned or transferred being held in a circuit other than the circuit in which such judge resides, in addition to the salary and expense money herein provided, shall be reimbursed from the state treasury for all reasonable and necessary travel and subsistence expenses incurred in connection with his service, assignment or transfer to the other court."

The portion of this bill which we must construe is the meaning of "all reasonable and necessary travel and subsistence expenses incurred * * *."

It would seem to us that Senate Bill 14, supra, was a conscious attempt by the Legislature to get away from the "flat allowance" system provided by repealed Section 478.017, RSMo 1949, supra, and to substitute an actual expense plan. We cannot otherwise construe the meaning of the word "incurred."

In the case of Maryland Casualty Company vs. Thomas, 289 SW2d 652, at l.c. 655, the Court of Civil Appeals of Texas, in an opinion rendered in 1956, gave extensive attention to the meaning of this word. It stated:

"* * *Under the record and according to the contentions made by the parties, the determination of this appeal depends upon the meaning of the word 'incurred' as used by the language found in the policy.

"Webster's New International Dictionary says, 'Incur' means to 'render liable or subject to; to become liable or subject to; to bring down upon oneself as to incur debt, danger, displeasure, penalty, etc.' The New Century Dictionary says that the word 'incur' means to 'become liable or subject to through one's own action; bring upon oneself: as to incur liabilities or penalties.'

"[1, 2] In our opinion, the word in question should be given its plain and ordinary meaning when used in an insurance contract, just as the word 'insurability' or any other commonly used word must be so used. 24 Tex. Jur. 939-940, Sec. 188.

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'The word "incur" in statute permitting deduction of expenses incurred during taxable year must be given ordinary and usual meaning.' 20 Words & Phrases, 626.

'The word "incur" means brought on.' 20 Words & Phrases, 624.

'"Incurred" means to become liable for, or subject to, to render liable or subject to; "incur" means something beyond contract, something not embraced in the word "debt." * * * In actions for injuries, recovery may be had for amounts shown to have been expended or incurred for hospital bills and medical treatment, provided such damages are properly pleaded; "incurred" meaning to become liable for. * * * "Incurred" means to become liable for, so that, as used in a guaranty that "we hold ourselves responsible for any costs and damages which may be incurred by said D.," it means such costs and damages as he shall become liable for, and not necessarily that such liability has been paid.' 20 Words & Phrases, 623.

"The last part of the above quotation shown appellant cites as authority in support of its contentions here made. In our opinion, it does not support appellant's contentions here made but supports the contrary position taken by appellee. It will be noted that the authority there cited and relied upon by appellant defines the word 'incurred' then illustrates its meaning and finally says: 'It means such costs and damages as he shall become liable for, and not necessarily that such liability has been paid.' Appellant also says 'incurred,' when applicable to medical expenses paid out or incurred, means to become liable for. Appellant contends in effect that the use of the phrase 'expenses incurred' as used in its policy means expenses for services that have already been 'rendered or performed within one year from the date the accident occurred.' Such a contention is not supported by appellant's authorities cited. Under all of the authorities cited, we think appellant became liable to

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appellee for 'all reasonable expenses * * * caused by the accident' on the day it occurred. A debt has been incurred when liability attaches; a contingency promise to pay has been incurred when the contingency upon which the payment depends occurs. It was then known that appellant would be liable for Kim's injuries only to the extent of a total of \$1000 and no more. However, in our opinion, appellant was liable for all reasonable expenses not to exceed \$1000 for the repairs of Kim's injuries caused by the accident whether the services correcting them have or have not been performed within one year from the date of the accident."

From the above, and from Senate Bill 14, we can only conclude that the term "travel expenses incurred" means just what it says. Thus, if you go by train or bus from your residence to a point in your circuit on court business, you could recover from the state the actual cost of such round-trip tickets, less the amount of federal tax, which a state employee is not required to pay. Paragraph C of Rule 7 of "Regulations" of the Department of Revenue, Office of Comptroller, reads:

"Tax exemption certificates for transportation shall be used in all cases in which the State is exempt from payment of federal taxes. State officials and employees shall be required to obtain such exemption from the public carrier and shall not be entitled to reimbursement for such charges on their expense accounts. A copy of the exemption certificate should in all cases be attached to the expense account or requisition."

If, instead, you rode with another person and he charged you, let us say \$5 for the round trip, and if such charge was "reasonable," you could recover \$5 from the state for such trip. On the other hand, if the party with whom you rode did not charge you anything for riding, then you would not have "incurred" any expense and so could not recover anything from the state.

If in making this trip, you drove your own motor vehicle, then you would be able to recover from the state the expense incurred.

It would seem to us that from the wording of Section 478.017, supra, that the circuit judge is placed in the same position as are other employees of the state who are entitled to reasonable and necessary travel and subsistence expenses. Under the authority

Honorable Claude E. Curtis

given him by Section 33.090, RSMo 1949, the state comptroller has enacted Rule 9 which reads:

"Allowance for travel by privately owned automobiles will be allowed at a rate not to exceed seven cents per mile, unless State laws make other provisions. No other expense will be allowed. Only the owner of the automobile receives mileage. (That is, if two or more people travel in the same automobile only 7¢ per mile is paid to one employee.) Mileage allowance outside the State of Missouri is not reimbursable unless travel by such means is advantageous to the State."

CONCLUSION

It is the opinion of this department that on and after July 3, 1958, at which time Senate Bill 14, enacted by the 69th General Assembly in special session, became effective, that judges of the circuit court should be reimbursed out of the state treasury for all reasonable and necessary travel expense actually incurred by them in such travel.

This opinion which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:gm

LAW PRACTICE: Individual merchant is not practicing law when representing himself in a court of record. Collection agency is practicing law when attempting to collect an account of a merchant in the magistrate court on a contingent basis.



January 28, 1958

Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Dawes:

This will acknowledge receipt of your request for an opinion which, for sake of brevity, we shall restate:

You inquire if a collection agent is practicing law without a license, in view of Section 484.010, RSMo 1949, if said agent takes over the collection of accounts of a merchant on a 50% contingent basis and does not remit to said merchant until judgment has been entered and he has fully collected said account. Furthermore, said agent files a pleading in the magistrate court indicating that he has purchased the account and sets out his claim praying for judgment of the full amount of the account. You further inquire if an individual merchant may personally file his claim in the magistrate court for a delinquent account, and the clerk get out a summons on the claim to creditors, and judgment rendered in the cause.

Section 484.010, RSMo 1949, defines the practice of law as well as law business. Said section reads:

"1. The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

"2. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or

Honorable George Q. Dawes

instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

Section 517.180, RSMo 1949, relating to magistrate courts, provides that any plaintiff or defendant, except infants or persons of unsound mind, may appear and conduct their suit or defense either in person or by attorney. However, they may not appear by agent.

Prior to 1941, Section 2593, RSMo 1939, relating to justice of peace practice, authorized not only the principal and attorney to appear and conduct a suit for a principal, but it could also be done by an agent of the principal. The General Assembly, in 1945, amended said statute and an agent is no longer included in the statute authorizing him to represent a principal.

A justice of the peace court was not considered a court of record, but the Legislature has now declared by statute that a magistrate court is a court of record. Section 476.010, RSMo 1949.

In C.J.S., Vol. 7, Section 16, pages 724, 725, the general principle is stated that one not licensed to practice law cannot represent a client in a court of record as attorney or agent. Section 16 reads, in part:

"In the absence of constitutional or statutory authority, a person who has not been admitted as an attorney cannot practice law, as by representing a client, in a court of record, either as an attorney or as the agent of his client. A person who has no right to practice law directly cannot do so indirectly by employing licensed attorneys to practice for him."

In Clark v. Austin, 101 S.W.2d 977, 1.c. 982, the court lays down a general rule or yardstick to determine whether or not one is engaged in the practice of law, as follows:

"It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons,

Honorable George Q. Dawes

firms, associations, or corporations as to their rights under the law, or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law. Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that purpose, is engaged in the practice of law. Rhode Island Bar Association et al. v. Automobile Service Association, 55 R.I. 122, 179 A. 139, 100 A.L.R. 226; People ex rel. Illinois Bar Association et al. v. People's Stock Yards State Bank, supra; Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910, 94 A.L.R. 356; In re Duncan, 83 S.C. 186, 65 S.E. 210, 24 L.R. A. (N.S.) 750, 18 Ann. Cas. 657; Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796."

In Liberty Mut. Ins. Co. v. Jones, 130 S.W. 2d 945, 1.c. 955 [8-12], the court held that while a layman may represent himself in court, he cannot, even on a single occasion, represent another, whether for a consideration or not. In so holding, the court said:

"It must be admitted that many definitions of the 'practice of law' include acts done both in and out of court, including services where no litigation is in prospect. Nevertheless there are fundamental differences between the practice of law - in the sense of court work - and law business. While a layman may represent himself in court, he cannot even on a single occasion represent another, whether for a consideration or not. And a corporation cannot represent itself in court at any time but must appear by attorney. On the other hand the doing of any single act out of court in a representative capacity that a lawyer might do will not necessarily convict a layman of engaging in

Honorable George Q. Dawes

the law business. The very term itself implies that he must have engaged in the business or held himself out, as some cases say. Illustrative decisions are cited in the margin. The holding out may be evidenced by repeated acts indicating a course of conduct, or by the exaction of a consideration."

It would appear that so long as the merchant is appearing in his own behalf he is not in violation of any of the foregoing statutes. However, no agent who is not a licensed attorney can represent another. In view of the fact that the collecting agency has not purchased the account of said merchant, but is taking on the collection on a contingent basis, it definitely is attempting to practice law, contrary to said statutes.

CONCLUSION

Therefore, it is the opinion of this department that no violation of the law has been committed by an individual merchant filing a claim for himself in the magistrate court in the collection of an account. However, no collection agency which is not licensed to practice law may file and prosecute a claim of an individual merchant in the magistrate court on a contingent basis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

ARH:mw

John M. Dalton
Attorney General

MAYOR:
OFFICE OF PROFIT:
FEDERAL EMPLOYEE:

(1) Under Article 7, Section 9 of the Missouri Constitution of 1945, the mayor of a third-class city in the State of Missouri would be the holder of an office of profit in this state. (2) A civil service employee under the Small Business Administration Act of the Federal Government is not necessarily by virtue of such employment a holder of an office of profit under the United States, but depending upon the facts of each situation of employment that civil service employee might be deemed an employee as distinguished from a holder of public office.

July 21, 1958



Mr. Dick B. Dale, Jr.
Attorney at Law
110 South College
Richmond, Missouri

Dear Mr. Dale:

This is in response to your request for an opinion from this office of May 26, 1958, which is stated as follows:

"I would appreciate an official opinion from your office concerning an interpretation of article seven section nine, of the Constitution of Missouri of 1945.

"The Mayor of the City of Richmond, Mayor James A. Weltmer, has recently been appointed as a civil employee under the small business administration act of the Federal Government. This is a civil Service appointment, and it is my understanding that the appointment will be permanent after Mr. Weltmer has served for ninety (90) days. It would appear that under article seven section nine of the Missouri Constitution Mr. Weltmer could no longer serve as Mayor of the City of Richmond, which is a third (3rd) class City. There is the possibility, however, that a Mayor of a municipality would not be 'any office of profit in this state' as set forth in article seven section nine. The question would then be whether a Mayor of a third (3rd) class City, receiving a salary as such Mayor could remain in office after having been appointed to a Civil Service appointment for profit under the Government of the United States.

Mr. Dick B. Dale, Jr.

"When Mr. Weltmer was first appointed to the Civil Service position, he felt that he could not continue to serve as Mayor; however, it is my understanding that he has a letter from the Civil Service Bureau which states in effect that his office as Mayor is not inconsistent with his Civil Service appointment under the small business administration act.

"Mr. Weltmer has indicated that he does not want to remain in office as Mayor if by so doing he is violating any constitutional provision of the State of Missouri. If it is the opinion of your office that a Mayor of the third (3rd) class City is included in article seven section nine, then I will merely show the opinion of your office to Mayor Weltmer, and he will resign. I do not anticipate any ouster proceeding of any nature in this matter. If, for any reason you would be of the opinion that the returning of such an opinion on this question would be beyond the pervue of your office, I would appreciate any authority which you might be in a position to give me concerning the cited constitutional provision."

As you are aware we are confronted with some problems which arise in the interpretation of Article 7, Section 9, of the Missouri Constitution of 1945. We state that section as follows:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserved corps excepted."

You may also have observed that this section is changed somewhat from Article 14, Section 4, of the Missouri Constitution of 1875 which provided that:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Mr. Dick B. Dale, Jr.

It would appear that in view of the 1945 constitutional section any office of profit "in this state" would be more likely to include an office of profit not necessarily an office "under this state."

We think that there is no question but that the office of mayor is a public office in this state. The courts of Missouri have in numerous cases defined what constitutes a public office, and we quote a definition which was approved in *State ex rel. Pickett vs. Truman*, 64 S.W. 2d, 105:

"A public office is the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

The Supreme Court of Missouri in the *Truman* case laid down certain criteria that would indicate a person is a public officer when:

(1) "The giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power. (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive."

We feel that under the definitions set forth that the office of mayor in a third-class city is a public office in this state.

Hence, we come to the question of whether the public office of mayor of a third-class city is an office of profit in this state. Section 11, 46 C.J., page 927, states the rule as to an office of profit and an honorary office, wherein it says:

"Offices are classified with reference to compensation as offices of profit and honorary offices. An office of profit, or a lucrative office, is one to which is attached a compensation for services

Mr. Dick B. Dale

rendered. An honorary office is one to which are attached no fees, perquisites, profits, or salary."

In following this rule there would seem to be no question in our mind but that the office of mayor of a third-class city, assuming it one to which is attached a compensation for the services of mayor, is an office of profit in the State of Missouri.

Nevertheless, in the situation which you have set forth in your letter it is our belief that the appointment of a person as a civil employee under the Small Business Administration Act of the Federal Government is not necessarily an appointment to an office of profit under the United States. Again, we come to the problem as to the distinction between the public office and a position of mere employment. It would appear that we should use the criteria as set forth in the Truman case, and that in so doing there may be an instance in which a civil employee is not a holder of an office of profit under the United States. This determination would rest on the particular facts of each case of employment, and it may be that you are in a position to readily determine that Mayor James A. Weltmer, by holding the office of mayor of the City of Richmond, Missouri, would not be in violation of Article 7, Section 9, of the Missouri Constitution of 1945 while also a civil employee of the Federal Government.

For your convenience we also enclose a former opinion of this office, November 8, 1945, which may be of assistance in determining whether Mayor Weltmer is a civil service employee.

CONCLUSION

It is the opinion of this office that:

(1) Under Article 7, Section 9 of the Missouri Constitution of 1945, the mayor of a third-class city receiving compensation for his services as mayor, in the State of Missouri, would be the holder of an office of profit in this state.

(2) A civil service employee under the Small Business Administration Act of the Federal Government is not necessarily, by virtue of such employment, a holder of an office of profit under the United States, but, depending upon the facts of each situation of employment, that civil service employee may be deemed an employee as distinguished from a holder of public office.

Sincerely yours,

JOHN M. DALTON
Attorney General

TAXATION:
MERCHANTS AND MANUFACTURERS:
MANUFACTURERS:

The term "raw materials", as used in Sections 150.310 and 92.040, RSMo 1949, means and includes all materials and things out of which the final or finished product is made.



February 10, 1958

Honorable Thomas F. Eagleton
Circuit Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Dear Mr. Eagleton:

Reference is made to your request for an official opinion of this office, which request reads, in part, as follows:

- "1. Under Sections 150.310 and 92.040, R.S.Mo. 1949 are the goods-in-process of a manufacturer taxable as part of the manufacturer's license levy?
- "2. If the answer to the foregoing question is in the negative, then are such goods-in-process taxable as personal property at existing tax rates by the Assessor of the City of St. Louis?"

You first inquire whether "goods-in-process" of a manufacturer are taxable under the provisions of Sections 150.310 and 92.040, RSMo 1949.

From the material submitted with your request, you understand the phrase "goods-in-process" to mean materials which have been subjected to some manufacturing processes by the company, person or corporation owning or holding the same, thereby changing it from the natural state or from the state in which it was received, but which will be eventually subjected to further manufacturing processes before it becomes a finished product, or goods actually undergoing manufacturing processes. The following opinion is based upon this understanding of the term "goods-in-process."

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Section 150.310, RSMo 1949, relating to the taxation of manufacturers, provides as follows:

"1. Every manufacturer in this state shall be licensed and taxed on all raw material and finished products, as well as all the tools, machinery and appliances used by them, in the same manner as provided by law for the taxing and licensing of merchants; and no county, city, town, township, or municipal authority thereof, shall ever levy any greater amount of tax against a manufacturer than is levied against merchants for the same period.

"2. Licenses issued under sections 150.300 to 150.370, shall be for one year, ending on the thirty-first day of December of the then current year.

"3. Nothing in sections 150.300 to 150.370, shall be so construed as to apply to manufacturers whose raw material, finished products, tools, machinery and appliances in the aggregate amount are less than one thousand dollars."

Section 92.040, RSMo 1949, to which you refer, refers to "the raw material, merchandise, finished products, tools, machinery and appliances used or kept on hand by manufacturers."

"Goods-in-process" clearly should not come within the term "finished product" as that term is used in the two above noted sections. Does it then come within the term "raw materials"? We believe that it does.

In the case of State v. Hennessy Co., 230 P. 64, the Supreme Court of Montana stated:

"* * * But, though the term 'raw material' is retained in many definitions of 'manufacture,' it denotes merely the material out of which the final product is made. It is obvious that what is raw material to one is a finished product to another. To the tanner leather is a manufactured or finished product, but to the shoemaker, it is raw material."

Honorable Thomas F. Eagleton

In the case of City of Henderson v. George Delker Co., 235 S.W. 732, the Court of Appeals of Kentucky, in referring to the use of the term "raw material" in a taxing statute, stated:

"* * * As shown in that case, it is not necessary, for a business enterprise to be a manufactory, that it should make completed articles from materials that are altogether raw, and we may add, as intimated in that opinion, that by the term 'raw material,' as used in the statute, is not necessarily meant crude material in its natural state, but there may be included in the term a product made from the crude material, and which has undergone manufacturing processes and controverted into a distinct product from which an entirely different one may be made by the application of additional scientific processes, in which case the converted or prepared product may be regarded as 'raw material' within the meaning of the statute."

See also the case of Tidewater Oil Co. v. U. S., 171 U.S. 210, 18 S.Ct. 837, 43 L.Ed. 139.

We are of the opinion that it was the intention of the General Assembly to include in the term "raw materials", as used in Sections 150.310 and 92.040, RSMo 1949, all materials owned or held by a manufacturer, other than those in a finished state ready for delivery or sale.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the term "raw materials", as used in Sections 150.310 and 92.040, RSMo 1949, means and includes all materials and things out of which the final or finished product is made and would embrace materials which have undergone some manufacturing processes but which will subsequently undergo further processes before becoming a finished product, and materials

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which are actually undergoing a manufacturing process and which have not reached the state of a finished product.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw

ELECTIONS :
BOARD OF ELECTION COMMISSIONERS:
COUNTY COURT:
SCHOOLS:
MUNICIPALITIES:

Construction of Sec. 111.255, RSMo,
Cum. Supp. 1957, providing for one
polling place and one set of election
officials where two elections are
being held in the political sub-
division on the same day.



March 10, 1958

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

This is in response to your request for an opinion, which
reads as follows:

"It is respectfully requested that your
office furnish us with an Attorney
General's ruling on the following ques-
tions pertaining to school elections
relating to Senate Bill 305 which was
made law by the 69th General Assembly,
and which has been requested by the
County Superintendent of Schools.

"1. The meaning of the words 'whenever
feasible'. Can the law be interpreted
to mean that it may be 'feasible' that
some of a school district's polling
places must be established in conjunc-
tion with a municipality's polling
places and that additional polling
places must be established by the dis-
trict for other areas in which joint
polling place is not feasible.

"2. Who determines who would be in
charge of the elections when an election
is held in a school district, fire dis-
trict, water district, and/or cities and
villages?

"3. What is meant by the provision that the body or official who has authority over 'general elections' in the political subdivision shall be the one who handles the election?

"4. What are the responsibilities of the St. Louis County Board of Election Commissioners under the provisions of this law when the only duty of that board in the April election is to prepare the registered voter lists for municipalities with populations in excess of five thousand?

"5. Who will pay the officials of election and how will the number of officials at each polling place be determined?

"6. If a joint election is held in a situation such as that which exists in the Normandy School District, is the School District required to furnish election officials for that part of a municipal ward or precinct within its boundaries and then provide separate polling places for the unincorporated areas in the district?

"7. What person or classes of persons are guilty of a misdemeanor in the event the provisions of the law are not followed?"

Senate Bill No. 305 of the 69th General Assembly, to which you refer, now Section 111.255, RSMo, Cum. Supp. 1957, reads as follows:

"Notwithstanding any other provisions of law, whenever any primary, general or special elections, or elections held by any school district, fire protection district, sewer district, municipalities, or other political subdivision of the state, are held upon the same day in any political subdivision, one polling place for the several elections in each precinct, consolidated precinct or district in the political subdivision shall whenever feasible be designated by the county clerk,

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board of election commissioners, or other proper election official, having authority over general elections in the political subdivision and the election officials in the polling places shall be designated by the county clerk, board of election commissioners or other proper election official and shall be compensated for one election only. Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

The primary rule in the construction of statutes is set out in *A. P. Green Fire Brick Co. v. Missouri State Tax Commission*, Mo. Sup., 277 SW2d 544, 545:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration.' *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W. 2d 920, 925. * * *"

Prior to the enactment of this law, it was generally accepted that the same persons might serve in a dual capacity and act as judges for two elections held on the same day in the same polling place, provided they met the qualifications of judges in both elections, but there was no requirement that this be done. It was also established that they were entitled to be compensated separately for both elections. See opinion of Attorney General to Stewart E. Tatum dated April 1, 1953, and Charles W. Medley dated April 7, 1955, copies enclosed. Consequently, in many instances elections were conducted by two political subdivisions having sometimes roughly, and often exactly, coextensive geographical boundaries with separate polling places, separate judges and duplicate expenses. It is the obvious purpose of this act to require that "whenever feasible" elections under such circumstances be conducted in the same polling places with the same election officials, to be compensated for one election only.

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Under ordinary circumstances, of course, when an election is being conducted by a political subdivision of the state, the governing body of the political subdivision, e.g., in the case of a school district the board of directors, in the case of a fourth class city the board of aldermen, etc., designates the polling places and appoints the judges of election. Under this bill, however, it is provided that, notwithstanding any other provision of law, if it is feasible to have one polling place and one set of election officials for two elections being held in a political subdivision on the same day, the polling places and the election officials shall be designated by the county clerk, board of election commissioners, "or other proper election official, having authority over general elections in the political subdivision." Although this latter phrase, "having authority over general elections," etc., modifying the phrase, "proper election official," occurs only in connection with the designation of the polling places, it must also be read into the act in regard to the designation of the election officials in order to make the act workable. State ex rel. and to Use of Tadlock v. Mooneyham, 212 Mo. App. 573, 253 SW 1098, 1100.

The term "general election" has been defined by statute and has an accepted meaning. Section 1.020, RSMo, Cum. Supp. 1957, provides, in part, as follows:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

* * * * *

"(3) 'General election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially."

Consequently, we must look to the laws governing general elections to determine what official or body is meant to be vested with the authority to designate the polling places and the election officials. First, however, the question arises as to what the phrase "having authority over general elections" means.

Various officials perform various duties with regard to the conduct of elections. Logically, however, this phrase must mean those officials under the laws governing general elections

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having authority similar to that conferred by this act, i.e., the authority to designate polling places and election officials. Some confusion is created by the naming of the county clerk in this connection, because under no circumstances is the county clerk vested with the authority to designate polling places and election officials in any election. In most counties these duties are performed by the county court (see opinion of Attorney General to John R. Caslavka, January 21, 1952, copy enclosed), but in St. Louis County, for example, by the Board of election commissioners (§113.080 and 113.130, RSMo 1949).

Since, therefore, in St. Louis County the board of election commissioners is "the proper election official, having authority over general elections," that is the body which, under this act, is vested with the authority to designate polling places and election officials when two or more elections are being held on the same day in any political subdivision and it is "feasible" to have one polling place and one set of election officials for both elections. This latter statement answers your questions numbers 2 and 3 and partially answers your question number 4.

There remains, however, the meaning of the phrase "whenever feasible" and the question of who determines feasibility.

"Feasible" is defined in Webster's New International Dictionary, Second Edition, as follows:

"Capable of being done, executed, or effected; possible of realization; as, your plan seems feasible; hence, successful in operation."

It is apparent that, in order for this act to mean anything, someone must have the responsibility of determining whether it is "feasible" to have one polling place for two or more elections. The phraseology of the enactment that "one polling place * * * shall whenever feasible be designated by the * * * board of election commissioners," would seem to vest this authority in the board of election commissioners, which is logical since it has the duty of designating the joint polling places.

Therefore, in answer to questions numbers 1 and 6, and in further answer to question number 4, we conclude that the Board of Election Commissioners of St. Louis County must make the initial determination of the feasibility of using one polling place for two or more elections. Taking into consideration all

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the factors involved where the boundaries of a school district and a municipality overlap but are not coextensive, as in your questions numbers 1 and 6, it is conceivable that the board of election commissioners might decide that it is feasible to have joint polling places for part of the political subdivisions but not the remainder. If this occurs, the board of election commissioners will designate the election officials for the joint polling places, and in the remainder of a school district, for example, the board of education as the governing body of the political subdivision will designate the polling places and the election officials in the normal manner.

In answer to your question number 5, we must again indulge in certain presumptions because the act says nothing about the number of election officials to be appointed. The required number of election officials varies with the type of election being conducted. For example, under the general election laws the number of judges to be appointed depends upon the number of voters at the next to the last preceding election (§111.280, RSMo 1949), but not less than four for each precinct (§111.270, RSMo 1949). For general elections in St. Louis County, four judges and two clerks are to be appointed (§113.130, RSMo 1949). For certain special elections, only two judges and two clerks are required (§111.290, RSMo 1949). In six-director school districts, three judges are to be appointed and they in turn select two clerks (§165.330, RSMo, Cum. Supp. 1957). In many municipalities, the number required is fixed by city ordinance.

If one polling place is designated for two or more elections wherein the number of election officials required varies with the type of election or the political subdivisions involved, then as a practical matter, in order for this law to work, the greatest number of election officials necessary to have a valid election for any of the elections involved must be appointed. For example, if a special school election is being held in conjunction with a general election in St. Louis County, four judges and two clerks must be designated because that is the number required for a valid general election, although only three judges and two clerks are necessary for a school election.

The question of paying the election officials is much more difficult of determination. All this act says in that respect is that they "shall be compensated for one election only." We cannot presume that the act was meant to shift the burden of paying for the elections from the political subdivisions involved to any other body, yet there is nothing in

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the act specifying how much the election officials shall be paid or by whom. Prior to the effective date of this act, in those instances where the same election officials were used for two or more elections, the election officials were entitled to be compensated for each separate election by each of the political subdivisions involved, as is pointed out in the enclosed opinion to Stewart E. Tatum. The limitation of compensation was held to be that specified in Section 111.350, RSMo 1949 (amended Laws 1957, House Bill No. 22). However, even then it was not necessary that either of the political subdivisions involved pay the maximum compensation. At page 5 of the Tatum opinion, we said that "Each appointing body should determine what compensation is desirable and allowable for services performed in their election, and provide compensation accordingly."

The only change which Section 111.255, supra, purports to make in this procedure is to limit the election officials to the maximum compensation allowable for one election. In other words, the political subdivisions will still pay the election officials, but instead of paying them up to the maximum for each election the combined total compensation provided by the political subdivisions involved must not exceed that allowable for one election. This, of course, will require co-operation on the part of the political subdivisions involved and an agreement between them as to the compensation to be provided for each.

Your seventh question must be answered in general terms and by example. Those persons who would be guilty of a misdemeanor in the event the provisions of Section 111.255, supra, are not complied with are those persons who have some duty to perform under this act and fail or refuse to do so. For example, if under this act facts and conditions clearly require that the Board of Election Commissioners in St. Louis County designate one polling place and one set of election officials for two or more elections being held in a political subdivision on the same day, and they fail or refuse to do so, those so failing or refusing would be guilty of a misdemeanor. As a further example, if the board of election commissioners has designated one polling place and one set of election officials for two elections being held in the political subdivision on the same day and the governing body of the political subdivision involved fails or refuses to comply therewith, the members thereof so failing or refusing are guilty of a misdemeanor.

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CONCLUSION

It is the opinion of this office that under Section 111.255, RSMo, Cum. Supp. 1957, where two or more elections are being held on the same day in any political subdivision, it is the duty of the body having the authority to designate polling places and appoint election officials in general elections, e.g., in St. Louis County the board of election commissioners, to designate one polling place and one set of election officials for both elections if feasible to do so; that the feasibility of designating one polling place under such circumstances is to be determined by the body having the authority to designate the polling places, e.g., in St. Louis County the board of election commissioners; that the number of election officials to be appointed is the largest number necessary in order for each election being conducted to be a valid election; that the election officials are to be compensated by the political subdivisions involved in an amount to be agreed upon by the governing bodies of the political subdivisions, but the combined total of such compensation shall not exceed the maximum allowable for one election; and that those officials having some duty to perform in compliance with this act, failing or refusing to do so, are guilty of a misdemeanor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (3)

INHERITANCE TAXES:
UNITED STATES SAVINGS
BOND TRANSFERS:
WHEN TAXABLE:

United States Savings Bonds, Series E, purchased more than two years prior to decedent's death, registered in her name, and on her death payable to her son, is a gift intended to come into possession and enjoyment of decedent's son at or after her death, and is a taxable transfer within the meaning of subsection 3, Section 145.020 RSMo Cum. Supp. 1957. It is immaterial as to whether or not transfer was made in contemplation of decedent's death within the two-year period referred to in subsection.

July 28, 1958

FILED

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Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton 5, Missouri

Dear Mr. Garnholz:

This department is in receipt of your request for a legal opinion which reads as follows:

"Mr. Irl B. Baris, an attorney who has been appointed appraiser for Missouri inheritance tax purposes in an estate presently pending in the St. Louis County Probate Court, has requested that I obtain a ruling from you on the following legal question:

"Is a tax to be imposed under the laws pertaining to Missouri inheritance tax upon United States Savings Bonds, Series 'E', purchased more than two years prior to the death of decedent and registered in the name of decedent, payable on her death to a surviving beneficiary."

From your letter of May 21, 1958, clarifying the opinion request, it appears the United States Savings Bonds, Series "E", were registered only in the name of decedent, and upon her death are payable to her son, and these are not co-ownership form of bonds registered in the name of decedent and her son.

The issuing of United States Savings Bonds of the type referred to in the opinion request are authorized by Section 757c, Chapter 12, Title 31 U.S.C.A., which reads:

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"(a) The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service or otherwise, United States savings bonds and United States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)-(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."

Section 747 of said Chapter 12 reads as follows:

"All bonds and certificates authorized by sections 752, 754, and 757 of this title shall be exempt, both as to principal and interest from all taxation imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war-profits taxes, imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations. The interest on an amount of such bonds and certificates the principal of which does not exceed in the aggregate, \$5,000, owned by any individual, partnership, association, or corporation, shall be exempt from the taxes provided for in subdivision (b) of this section."

In accordance with the authority granted to him by Section 757c, supra, and with the approval of the President, the Secretary of the Treasury has offered various issues of United States Savings Bonds to the public, designated by a letter and the year in which they were issued.

The Secretary of the Treasury has promulgated rules pertaining to the issuance of and information in general concerning United States Savings Bonds as shown under Title 31, part 315 of the Code of Federal Regulations. Section 315.2 of said regulations provides that such bonds shall be issued only in registered

Honorable Edward W. Garnholz

form, and Section 315.4 contains further restrictions on the form of registration of Series "E" Bonds, which reads in part as follows:

"Authorized forms of registration, Series E, and general provisions relating to their use -

(a) Forms of registration. Bonds of Series E may be registered only in the names of individuals (natural persons), whether adults or minors, in their own right in one of the following forms:

"(1) One person. In the name of one person, for example: 'John A. Jones.'

"(2) Two persons; coownership form. In the names of two (but not more than two) persons in the alternative as coowners, for example:

John A. Jones or Mrs. Ella S. Jones.

"No other form of registration establishing co-ownership is authorized.

"(3) Two persons; beneficiary form. In the name of one (but not more than one) person, payable on death to one (but not more than one) other person, for example:

John A. Jones, payable on death to
Miss Mary E. Jones.

"'Payable on death to' may be abbreviated as 'p.o.d.' The first person named is hereinafter referred to as the owner or registered owner, and the second person named as the beneficiary or designated beneficiary."

For the purpose of our present discussion, it will be assumed that the savings bonds referred to in the opinion request have been properly registered in the name of the owner and payable on her death to her son named therein, in compliance with Section 315.4, supra.

In considering the question asked in the opinion request, as to whether or not a tax can be imposed on the bonds referred to, we believe it is proper to consider the kind or character of the Missouri inheritance tax.

Honorable Edward W. Garnholz

In the case of *Priedeman v. Jamison et al.*, 202 SW2d 900, in discussing the State Inheritance Tax, the court said at l.c. 903:

"It has been said succession taxes cover both real and personal property. Such a tax is an exercise on the privilege of taking property by will or by inheritance or by succession in other form upon death of the owner.* * *"

In *re Rosing's Estate*, 85 SW2d 495, at l.c. 500, the court said:

"To our mind it is clear that the last sentence of this section applies to all four kinds of transfers that are mentioned in this section. This sentence says: 'Such tax shall be imposed when any person * * * actually comes into the possession and enjoyment of the property.* * *' It follows, therefore, that our state inheritance tax is a tax on the right to receive property and not a tax on the right to transfer property after death."

From these decisions, which are typical of those of the appellate courts of Missouri, it is readily seen that inheritance taxes are not taxes levied on property transferred to another at or after the owner's death, but rather, such taxes are those levied on the right to receive property at or after the owner's death.

In *re McKinney's Estate*, 173 SW2d 898, l.c. 900, it appears the court so stated in the following language:

"It is no longer debatable that our inheritance tax is a tax on the right to receive or take property rather than on the right to transfer property after death (*In re Bernay's Estate*, 344 Mo. 135, 126 S.W.2d 209, 122 A.L.R. 169; *In re Zook's Estate*, 317 Mo. 986, 296 S.W. 778), and, therefore, the incidence of the tax falls upon the recipient of the property, the amount of the tax being determined by the net value of the property received by the beneficiary from the gross estate.* * *"

To attempt to levy a tax on savings bonds such as those described above, would not only be contradictory to our present inheritance tax laws, but would also violate Section 747, Title 31 U.S.C.A. supra, which specifically exempts the principal and interest of said bonds from local taxation. The exception as to inheritance taxes in the section does not mean that

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local taxes of any kind on the bonds themselves are permissible, but that a local tax on the right to receive such bonds on the death of the registered owner may be taxed by the states.

Federal court decisions have upheld inheritance taxes levied by the states on the right to receive property upon the death of another, when the property transferred was savings bonds or other types of government securities. In this connection we call attention to the case of *Plummer v. Coler*, 178 U.S. 115, 44 L. Ed., 998, in which the court said at l.c. 1004 and 1008 as follows:

"The decisions of the state courts may be summarized by the statement that it is competent for the Legislature of a state to impose a tax upon the franchises of the corporations of the state, and upon the estates of decedents resident therein, and in assessing such taxes and as a basis to establish the amount of such assessments, to include the entire property of such corporations and decedents, although composed, in whole or in part, of United States bonds; and that the theory upon which this can be done consistently with the Constitution and laws of the United States is that such taxes are to be regarded as imposed, not upon the property, the amount of which is referred to as regulating the amount of the taxes, but upon franchises and privileges derived from the state.

* * * * *

"We think the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed."

Section 145.020, RSMo Cum. Supp. 1957, provides what transfers are subject to inheritance taxes, and reads in part:

"1. A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to persons, institutions, associa-

tions or corporations, not herein exempted, in the following cases:

"(1) When the transfer, by will or the intestate laws, is from any person who is a resident of this state at the time of his death;

"(2) When the transfer, by will or intestate laws, is of property within this state or within its jurisdiction, and decedent was a non-resident of the state at the time of his death;

"(3) When the transfer is made by a resident or by a nonresident whose property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every such transfer made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be considered to have been made in contemplation of death within the meaning of this section; * * *."

It appears that such transfers fall within the class of transfers mentioned in paragraph 1, Section 145.020, supra, and if the circumstances under which the transfer is made meet the requirements of this statute, then it is a taxable one. Subsection 3 of said paragraph 1 of Section 145.020, supra, refers to different circumstances under which transfers are made. It is noted the property transferred may be, but is not required to be, a part of decedent's estate, since reference is made to transfers "* * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death."

If property is transferred under any of the circumstances or by any of the methods referred to in said subsection, then the transfer is a taxable one, regardless of the fact that the property transferred is United States Savings Bonds.

In this connection, we call attention to the case of *In re Costello's Estate*, 92 SW2d, 723, in which the term "enjoyment" was construed. The court held in effect, that the terms, when "any person" actually comes into possession and "enjoyment" of property within the meaning of the inheritance tax statute, that the word "enjoyment" meant control and not personal enjoyment.

Honorable Edward W. Garnholz

From the facts given in the opinion request, it appears that the registered owner of the Series E Savings Bonds intended to and did make a gift of said bonds to her son, and that such gift was not to come into the possession, enjoyment, and/or control of the son until the death of his mother. Until that event occurred the mother still exercised control over, and might have cashed the bonds at any time she desired to do so.

In view of these facts, it would be immaterial as to whether the transfer was made in contemplation of the death of the donor within the two-year period referred to in subsection 3, Section 145.020, supra.

Since the gift of the bonds was one intended by the donor to take effect in possession and enjoyment of the donee, upon the death of the donor, it is believed that such transfer is a taxable one under provisions of Section 145.020, supra.

CONCLUSION

Therefore, it is the opinion of this department that when United States Savings Bonds, Series E, were purchased more than two years prior to the death of decedent, and registered in decedent's name, payable on death to her son, the bonds are a gift to the son, intended by decedent to come into the possession and enjoyment of the son at or after decedent's death and constitutes a taxable transfer within the meaning of subsection 3 of paragraph 1, Section 145.020, RSMo Cum. Supp. 1957, and is subject to Missouri inheritance taxes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

VOTING MACHINES: It is the opinion of this office that the proposition of the retention in office of certain judges under Article V, Section 29(c) (1) of the 1945 Missouri Constitution can be properly submitted to the voters of this State on voting machines.

October 6, 1958



Michael L. Galli, Chairman
Board of Election Commissioners
for the City of St. Louis
208 South Twelfth Boulevard (2)
St. Louis, Missouri

Dear Mr. Galli:

This is in answer to your opinion request to this office dated September 26, 1958, which reads as follows:

"The Secretary of State's certified form of Judicial Ballot to be voted on November 4, 1958, shows the following instruction to voter:

Submitting to the voters whether the Judges named below, whose terms expire December 31, 1958, shall be retained in their offices for new terms. **VOTE ON EACH JUDGE.** To vote YES, scratch NO. To vote NO, scratch YES.

and below the ^{YES}_{NO} opposite each Judges' name are the words, ^{NO} in parenthesis, (scratch one).

"As we are using voting machines it is impossible for the voter to scratch and we therefore ask for an opinion where voting machines are used, can the voter vote to retain the Judges in office by pulling the lever of the machine so as to place an "X" mark in the square opposite the word YES, and vote no by placing an "X" mark in the square opposite the word NO."

Article V, Section 29(c) (1) of the 1945 Missouri Constitution provides as follows:

**"TENURE OF JUDGES--DECLARATIONS OF CANDIDACY--
FORM OF JUDICIAL BALLOT--REJECTION AND RETENTION.**

Michael L. Galli, Chairman

"--Each judge appointed pursuant to the provisions of sections 29(a)-(g) shall hold office for a term ending December 31st following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 29(a)-(g) become applicable to this office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 29(a)-(g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 29(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such a declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the geographic jurisdictional limit of his court, or circuit if his office is that of circuit judge, on a separate judicial ballot, without party designation, reading:

'Shall Judge.
 (Here the name of the judge shall be
 of the.
inserted) (Here the title of the Court
 Court be retained in office?
shall be inserted)
Yes (Scratch One) No.'

"If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in Section 29(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December 31st following such election as is provided for the full term

Michael L. Galli, Chairman

"of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed."

As can be seen, this provision requires that a separate judicial ballot without party designation be used in submitting to the voters the proposition of retaining certain judges in office. It is our opinion that the object of this constitutional provision is threefold.

The object of submitting the proposition on a separate judicial ballot is to call the attention of each and every voter directly and specifically to the specific question submitted to him and to put it before him so that there could be no chance for him to confuse it with any other matter submitted at the election. The use of a separate ballot makes the voting on the proposition to retain a certain judge in office an election separate and distinct from any other election held at the same time and place.

The object of submitting the proposition on a ballot is to insure secrecy to the voter in expressing his choice on the proposition.

The object of submitting the proposition on a ballot without party designation is to withdraw candidates for judicial offices from partisan politics.

Keeping in mind these three objects of the above constitutional provision, the question now is whether the said constitutional provision and the objects thereof will be complied with if the proposition of retaining certain judges in office is submitted to the voters on a voting machine.

The framers of the 1945 Missouri Constitution provided for the use of voting machines in Missouri elections when they provided in Article VIII, Section 3, as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. * * *"

The Missouri legislature in following up this constitutional provision enacted Chapter 121, Cum. Supp. 1957, during the year 1953. This legislation provides for the use of voting machines in Missouri elections.

Michael L. Galli, Chairman

In applying the use of voting machines to the objects of Article V, Section 29(c) (1) of the Constitution, it is our opinion that the proposition of retaining certain judges in office can be submitted to the voters on a voting machine separate and apart from any other propositions submitted at the same time and place. It is our opinion that the proposition on a voting machine would call the voter's attention to that proposition as directly and specifically as would the submission of the proposition on a separate paper ballot.

As to the second object, it is our opinion that the submission of the proposition to the voters on a voting machine will insure the same secrecy to the voter that he would have in using a separate paper ballot. It is our opinion that the word ballot as used in Article V, Section 29(c) (1) is not used in the literal sense but merely by way of designating a method of conducting elections that will guarantee the secrecy of the choice of the voter. We believe the word "ballot" is used generally to describe any system of voting which insures secrecy to the voter in recording his choice, rather than specifically to describe any peculiar or particular method of accomplishing that result. We do not believe the framers of the constitution meant that the word "ballot" be so interpreted as to defeat the objects of the other provisions of the constitution, namely, Article VIII, Section 3. It is our opinion that voting by means of a voting machine is voting by ballot.

As to the third object of Article V, Section 29(c) (1), it is our opinion that the proposition can be submitted to the voters on voting machines without party designation in connection therewith.

CONCLUSION

It is the opinion of this office that the proposition of the retention in office of certain judges under Article V, Section 29 (c) (1) of the 1945 Missouri Constitution can be properly submitted to the voters of this State on voting machines.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard W. Dahms.

Yours very truly,

John M. Dalton
Attorney General

RWD:om

PREVAILING WAGE LAW:
SCHOOL DISTRICTS:
CITIES, TOWNS AND VILLAGES:
MUNICIPALITIES:

The so-called prevailing wage law,
as contained in Sections 290.210
to 290.310, RSMo Cum. Supp. 1957,
applies to and includes incorporated
municipalities and school districts.

January 23, 1958

Honorable William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri



Dear Mr. Gladden:

Reference is made to your request for an opinion of this office wherein you inquire as to whether the popularly termed prevailing wage law, as contained in House Bill No. 294, enacted by the 69th General Assembly, applies to municipalities and school districts. Said law is contained in Chapter 290, RSMo Cum. Supp. 1957, Sections 290.210 to 290.310.

The policy of said law is declared in Section 290.220, RSMo Cum. Supp. 1957, as follows:

"It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work."

Section 290.230, RSMo Cum. Supp. 1957, provides as follows:

"1. Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance

Honorable William E. Gladden

work. Only such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works.

"2. When the hauling of materials or equipment includes some phase of construction other than the mere transportation to the site of the construction, workmen engaged in this dual capacity shall be deemed employed directly on public works."

The term "public body", as used in both of the two above-noted sections and elsewhere throughout the entire chapter, is defined in Section 290.210 (6), RSMo Cum. Supp. 1957, as follows:

"(6) 'Public body' means the state of Missouri or any officer, board or commission of the state, or other political subdivision;"

The sole question then is as to whether municipalities and school districts are political subdivisions.

First, in regard to municipalities, your attention is invited to the case of *State ex inf. Ellis, ex rel. Patterson et al. v. Ferguson*, 333 Mo. 1177, 65 S.W.2d 97, wherein the court stated:

"Is a city of the third class a political subdivision? A standard work on municipal corporations so defines it in the following language: 'A municipal corporation, in its strict and proper sense is a body politic and corporate constituted by the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law as an agency of the State to assist in civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated.' Dillon (5th Ed.) vol. 1, § 31. (Italics ours.)

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"Section 47 of article 4 of the original Constitution, prohibiting the lending of credit, refers to counties, cities, towns, or townships as 'political corporations or subdivisions of the State.' (Italics ours.)

"We approve the following observations made in *Kinney v. City of Astoria*, 108 Or. 514, 528, 217 P. 840, 845: 'Pure municipal corporations, such as cities, are merely instrumentalities of the state, established for the convenient administration of local government; they are state governmental agencies; they are auxiliaries of the state for the purpose of self-government; they are mere political subdivisions of the state created by authority of the state for the purpose of exercising a part of its powers.'"

In regard to school districts, your attention is invited to the case of *State ex inf. McKittrick, v. Whittle*, 333 Mo. 705, 63 S.W.2d 100, wherein the court stated:

"Respondent next contends that a school district is not a political subdivision of the state. The authorities are to the contrary. It is defined by a standard text as follows: 'A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' 56 C.J. 193.

"This definition is approved by this court in *State ex rel. Carrollton School Dist. v. Gordon*, 231 Mo. 547, loc. cit. 574, 133 S.W. 44, 51, in which we said: 'A school district is but the arm and instrumentality of the state for one single and noble purpose, viz., to educate the children of the district; a purpose dignified by solemn recognition in our Constitution (section 1, art. 11 * * *), reading: "A general diffusion of knowledge and intelligence being essential to preservation

Honorable William E. Gladden

of the rights and liberty of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years." In obedience to that constitutional mandate, the General Assembly has established such schools and given over to school districts, acting through boards of directors, the single duty and authority to maintain them.'

"In City of Edina to use v. School District, 305 Mo. 452, loc. cit. 461, 267 S W. 112, 115, 36 A.L.R. 1532, we also said: 'Under the Constitution of 1875, the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function and not a special corporate or administrative duty. They are purely public corporations, as has always been held of counties in this state.'

* * * * *

"Thus it appears that a school district is a political subdivision of the state within the meaning of section 13, art. 14, of the Constitution."

In view of the foregoing noted case authorities, we are of the opinion that municipalities and school districts are, in the usual and ordinary sense, political subdivisions and that the General Assembly intended to include municipalities and school districts within the term "public body" as that term is used in Chapter 290, Sections 290.210 to 290.310, RSMo Cum. Supp. 1957.

CONCLUSION

Therefore, it is the opinion of this office that the so-called prevailing wage law, as contained in Sections 290.210 to 290.310, RSMo Cum. Supp. 1957, applies to and includes incorporated municipalities and school districts.

Honorable William E. Gladden

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw



February 11, 1958

Honorable Floyd R. Gibson
Member, Missouri State Senate
701 North Union
Independence, Missouri

Dear Senator Gibson:

This letter of instruction and advice is written in lieu of a formal opinion in answer to your request of January 28th, 1958, for reasons hereinafter appearing.

Section 16, Article 6, Missouri's Constitution of 1945 provides:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

To disclose implementation of the foregoing constitutional provision, we quote the following language from *St. Louis Housing Authority v. St. Louis*, 239 S.W. (2d) 289, 361 Mo. 1170, 1.c. 1175:

"After the 1945 Constitution became effective, in an obvious implementation of Sections 16 and 21 of Article VI of the Constitution, the General Assembly enacted Laws Mo. 1947, Vol. I, pages 401 to 404 (now 70.210 to 70.320 R.S.Mo. 1949)."

Section 70.220, R.S.Mo. 1949, Cum. Supp. 1957, treats this power to contract and cooperate in the following language:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive

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official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."
(Underscoring supplied.)

Section 70.210, R.S.Mo. 1949, Cum. Supp. 1957, defines "political subdivision" as including counties. Attention is directed to the first underscored portion of Section 70.220, R.S.Mo. 1949, Cum. Supp. 1957, supra. The language "or with any private person, firm, association or corporation" constitutes the sole amendment made to that statute by Senate Bill 218, passed by the Sixty-Ninth General Assembly, and effective August 29, 1957. Such amendment is significant in view of the question posed in the request for this opinion. Section 70.220, supra, as it now stands, obviously confers authority on a county or counties to contract with any private person, firm, association or corporation for the purposes and subject to the limitations set forth in the statute. The rule with respect to "limitations" is found in the following language from Section 70.220, supra:

" * *; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision."

In *Everett v. County of Clinton, Mo.*, 282 S.W. (2d) 30, 1.c. 35, the Supreme Court of Missouri dealt with powers of counties in the following language:

" * * the general rule in Missouri with regard

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to powers of counties is well stated in King v. Maries County, 279 Mo. 488, 249 S.W. 418, 420, as follows: 'It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. * * * This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. * * * ' And see Blades v. Hawkins, 240 Mo. 187, 195, 112 S.W. 979."

The foregoing review of Section 16, Article 6, Missouri's Constitution of 1945, and Section 70.220, R.S.Mo. 1949, Cum. Supp. 1957, leads to the conclusion that third and fourth class counties in Missouri may contract singly or jointly with any private person, firm, association or corporation for planning services, provided that the subject and objectives of such planning services involve a project within the scope of powers granted to such counties by statute. The letter of inquiry, supplemented by its enclosures, does not recite facts from which we are able to determine the definite subject and objectives of the planning services contemplated, and this letter of instruction, of necessity, covers only the general contract powers of counties of the third and fourth class.

If you are able to furnish this office with additional facts which may bring these contemplated contract services within the purview of our statutes relating to county planning, zoning, recreation, etc., every effort will be made to write a formal opinion applying the applicable statutory law to a given fact situation.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

COUNTY HOSPITALS:
OFFICERS:

Trustees of county hospital organized as provided in Section 205.190, RSMo 1949, are unauthorized to provide salary for one of their members acting as secretary to the board of trustees.



March 10, 1958

Honorable William E. Gladden
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Gladden:

The following opinion is rendered in reply to your inquiry reading, in part, as follows:

"In view of the provisions in Section 205.190, V.A.M.S. 1949, is a County Hospital Board of Trustees authorized to pay a salary to one of the said members of the Board as secretary of the Board? To further amplify on the situation in our County, the County Hospital Board of Trustees has elected one of the said Trustees as the secretary of the Board and this secretary has been authorized by the Board to oversee the construction and purchasing of equipment and establishing a staff for the County Hospital which is now under construction. Because of these extensive duties of the secretary, which are over and above his regular duties of acting as secretary at any meeting, the Board has voted to pay this secretary a regular monthly salary and the secretary is retaining his place as a member of the Board of Trustees."

Section 205.190, RSMo 1949, provides for the organization of the board of trustees for the county hospital and provides, in part:

"1. The trustees shall, within ten days after their appointment or election, qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of one of their number as chairman, one as secretary, and by the election of such other officers as they may deem necessary, but no bond shall be required of them."

Honorable William E. Gladden

* * * * *

"3. No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of all of the trustees present at a meeting of the board. *** " (Emphasis supplied.)

That portion of Section 205.190, RSMo 1949, quoted above, stating that "no trustee shall receive any compensation for his services performed" is clear and unmistakable in its language and must be considered as a mandatory directive to the trustees. In *Fulton v. City of Lockwood*, 269 S.W. (2d) 1, 1.c. 8, we find an applicable rule stated as follows:

"The protection of the public and the declared public policy requires public officials to comply with mandatory statutory provisions, and such requirements may not be avoided by a compliance only when the official sees fit to comply."

It may not be contended that the trustee who is also denominated secretary of the board of trustees may serve in both capacities in this instance in view of the following language from *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 344 Mo. 795, 1.c. 800:

"Appellant contends he may act in two different capacities at the same time and that compensation received in one capacity will not be treated as compensation received in the other. Appellant overlooks the fact that the existence of the two capacities, employer and employee, in the same individual is incompatible and is peremptorily prohibited by law."

CONCLUSION

It is the opinion of this office that a member of the county hospital board of trustees organized under Section 205.190, RSMo 1949, who is elected secretary of said board of trustees, may not receive compensation for performing any duties as such secretary.

Honorable William E. Gladden

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

OFFICERS: Offices of mayor of third class city and county collector of third class county are not incompatible nor inconsistent and both may be held by the same citizen at the same time.

March 26, 1958



Honorable Weber Gilmore
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Mr. Gilmore:

Your recent request for a legal opinion of this department has been received, and reads as follows:

"Could a citizen of Scott County, Missouri, hold, at the same time, the office of Mayor of the City of Sikeston, Scott County, Missouri, and the office of County Collector of Scott County, Missouri?"

It is established by Research Memorandum No. 5 of the Committee on Legislative Research that, in compliance with Article VI, Section 15 of the Constitution of Missouri, and Section 72.030, RSMo 1949, the city of Sikeston is a third class city.

No constitutional or statutory provisions of Missouri prohibit a citizen from holding the offices of mayor of a third class city and county collector of a third class county at the same time.

By virtue of Section 140.670, collectors are required to make settlements and turn over funds in their custody. Had the Legislature wanted to prevent collectors from holding other offices of trust at the same time it would have been an easy matter to have enacted such a law in the words that would have needed no construction, such as Section 54.040, RSMo 1949, which reads:

Honorable Weber Gilmore

"No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

That was not done.

It might be considered that Section 52.310, RSMo 1949, would stand as a bar to the concurrent holding of the offices of mayor and county collector, which states:

"No collector or holder of public moneys or any assistant or deputy of such holder or collector of public moneys shall be eligible or appointed to any office of trust or profit until he shall have accounted for and paid over all sums for which he may be accountable."

However, upon a reading of Section 52.310, supra, in conjunction with Section 54.040, and in the absence of any other statute with respect to collectors, it is reasonable to construe Section 52.310, RSMo 1949, as a bar only when the officer involved is in default.

On the face of Section 140.720, RSMo 1949, insofar as it relates to the collection of taxes under Sections 140.670 and 140.680, it would appear to apply to third class cities. If it were applicable it would seem that, since no one under Section 140.720 is specifically required to bring suit, it might become the duty of the mayor and council to institute actions to collect on the county collector's bond. Under these circumstances there would tend to be incompatibility between the offices of mayor and county collector. However, such section is not applicable because of the holding of the court in State ex rel. Steed vs. Nolte, 138 SW2d 1016, which states:

"Relators contend that not only must the taxes of respondent city be collected by advertisement and sale as outlined in the original Jones-Munger Law, but also that they must be collected by county and not city officers. Relators base this claim on Sections 9970 and 9971, Revised Statutes 1929 (Mo. Stat. Ann., pp. 8012-8013); and on certain sections of the Jones-Munger Law.

Section 9970 provides that the collectors of all cities having authority to levy and collect taxes shall annually return to the county collector all unpaid real estate assessments and Section 9971 provides that the county collector shall have power to collect such assessments. These sections were first enacted in 1872 (Laws of 1871-2, page 118) at a time when no city had a lien for, or the power to collect, city taxes. In 1879 and later, as we have already pointed out, various classes of cities were granted a lien for, and the power to collect their own taxes. Notwithstanding this, Sections 9970 and 9971 have been retained in the statutes and Section 9970 was repealed and reenacted in substantially the same form in 1933, the only change being to substitute the words 'first Monday in March' for the words 'first day in May.' (Laws of 1933, p. 450.) The apparent conflict between the statutes, now numbered 6995 and 9970, 9971, respectively, was considered by this court in the case of *City of Aurora ex rel. v. Lindsay*, 146 Mo. 509, 48 S.W. 642, decided in 1898. It was there held that the city collector, not the county collector, was the proper officer to collect taxes due a city of the fourth class. That ruling has not since been departed from; so, when the General Assembly repealed and reenacted Section 9970 in 1933, in the same form, they are presumed to have adopted the construction so placed on the statutes by this court. (*State ex inf. Gentry v. Meeker*, 317 Mo. 719, 296 S.W. 411.) In other words, said Section 9970, both before and after its reenactment in 1933, was and is applicable only to the limited number of cities above mentioned, which still return their delinquent taxes to county instead of city officers. The expression 'such cities,' appearing in Sections 9949, 9950, and other sections of the Jones-Munger Law and of the Revised Statutes, refers to such cities as from time to time have been granted the power to collect their own taxes,

Honorable Weber Gilmore

and those sections vest in city officers the same duties as to city taxes as are exercised by county officers as to other taxes. Section 9963c makes this clearer by requiring us to read the word 'city' into the various sections where the word 'county' appears.

"Our conclusions in this case apply only to the collection of city taxes in cities of the fourth class. Other cities are governed by different statutes which may or may not compel a different result."

Following the principles as stated, we find that Section 94.150 pertains to the enforcement of taxes in cities of the third class and that, therefore, Section 140.720 does not create any incompatibility.

By the common law, incompatible offices cannot be held by one person at the same time, and, since the common-law doctrine is still in effect in Missouri, we must determine whether the offices mentioned in the opinion request are compatible or incompatible before attempting to answer such an inquiry. The general rule as to when offices are considered to be incompatible has been stated in American Jurisprudence, Volume 42, page 936, as follows:

"They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible.

It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."

The common-law doctrine of compatible and incompatible offices was stated and applied in the case of Walker v. Bus, 135 Mo. 325. In this case it was held that the office of deputy sheriff of the City of St. Louis was not incompatible with that of school director and could be held by the same person at the same time. At l.c. 338 the court said:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officer, as where one has some supervision of the other, is required to deal with, control, or assist him."

As to whether there is any inconsistency and incompatibility between the offices of a mayor of a third class city and the county collector of a third class county in Missouri, to the extent that a citizen cannot hold both offices at the same time, there will be required a consideration of the statutes relating to the nature and the duties of each office.

Honorable Weber Gilmore

We therefore direct your attention to the following chapters of the Revised Statutes of Missouri, 1949, for a detailed comparison:

Chapter 52, pertaining to county collectors;

Chapter 77, pertaining to cities of the third class;

Chapter 140, pertaining to collection of delinquent taxes generally.

In general, it is found that the duties of the county collector of a third class county relate to the collection of taxes assessed by the county and to the dissemination of those funds to the appropriate treasurers. There are to be mailed to the taxpayers statements of taxes due and receipts for payment therefor. The county collector is not controlled by the city, or mayor, and his duties are not of an executive nature.

From the provisions of Chapter 77, RSMo 1949, relating to the duties of a mayor, it appears that the mayor is the chief executive of a third class city. As such officer, he has general supervision and control over all other officers and affairs of the city. The statute also provides that he shall be vigilant in the enforcement of our laws and ordinances in the government of the city. It is noted that the powers and duties of the mayor prescribed by statute are limited to the enforcement of all laws, ordinances and affairs of the city of which he is mayor, and that he has no powers and duties to perform as such, nor does he have any supervision or control over any other officers or political subdivisions of the state.

Upon a study of these chapters of the Revised Statutes of Missouri, 1949, and supplements, it is our opinion that the office of mayor of a third class city is not inconsistent nor incompatible with the office of county collector of a third class county, to the extent that the individual in the office of mayor could not at the same time hold the office of county collector.

CONCLUSION

It is our conclusion that a citizen of Scott County, Missouri, can hold the office of mayor of the City of Sikeston,

Honorable Weber Gilmore

Scott County, Missouri, and the office of county collector of Scott County, Missouri, at the same time, provided that at the time of assumption of the office of mayor, the said county collector shall not be in default of the sums for which he is accountable in his capacity of the office of the county collector.

Yours very truly,

John M. Dalton
Attorney General

JBS:mc;lc;ml

COUNTIES:
MISSOURI COMMISSION
OF RESOURCES AND
DEVELOPMENT:

(1) Counties of Platte, Clay and Cass in Missouri have authority to contract, singly or jointly, with a planning agency to formulate plans for general land use. (2) Missouri Commission of Resources and Development has authority to carry out area planning in State. (3) Eligibility of Community Facilities Service Department of University of Missouri to accept local matching funds for planning in metropolitan areas to be determined by Federal agency making such funds available.

accept local matching
determined by Federal



May 29, 1958

Honorable Floyd R. Gibson
Member, Missouri State Senate
701 North Union
Independence, Missouri

Dear Senator Gibson:

Your letter of January 28, 1958, requesting a formal opinion from this office has been supplemented by a letter dated March 6, 1958, from the Executive Director of the Metropolitan Area Planning Council, 701 Railway Exchange Building, Kansas City, Missouri, and a letter dated March 10, 1958, from the Director of Planning, Community Studies, Inc., 724 Railway Exchange Building, Kansas City, Missouri. The combined inquiries may be restated in the following questions to be answered in this opinion:

1. Do the counties of Platte, Clay and Cass in Missouri have authority to contract, singly or jointly, with a planning agency to formulate plans for general land use, including land use for industry, for homes, for recreation, for business, for streets and thoroughfares, and for utilities such as sewers, water, gas and electricity?
2. Can the Community Facilities Service Department of the University of Missouri, which participates with all governmental units in the planning and training of police, fire and governmental personnel, accept local matching funds for planning in metropolitan areas, such matching planning funds to be obtained from the Metropolitan Area Planning Council in an effort to qualify for and secure Federal funds to use for metropolitan planning?
3. Does the Missouri Commission of Resources and Development have authority to accept funds from either the Federal Government or a private

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agency, such as Community Studies, Inc., or from both such sources, to carry out planning services in different areas of the State?

4. Can Section 255.040, RSMo 1949, be construed as authorizing the Missouri Commission of Resources and Development to study and plan in any particular area of the State as the Commission sees fit?

The first question involves powers of counties, and particularly the counties of Platte, Clay and Cass, in Missouri.

Section 16, Article 6, Missouri's Constitution of 1945 provides:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Section 21, Article 6, Missouri's Constitution of 1945 provides:

"Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest."

To disclose implementation of the foregoing constitutional provisions, related to the question being considered, we quote the following language from St. Louis Housing Authority vs. St. Louis, 361 Mo. 1170, 1.c. 1175, 239 S.W.(2d) 289:

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"After the 1945 Constitution became effective, in an obvious implementation of Sections 16 and 21 of Article VI of the Constitution, the General Assembly enacted Laws Mo. 1947, Vol. I, pages 401 to 404 (now 70.210 to 70.320 R.S.Mo. 1949)."

Section 70.220, R.S.Mo. 1949, Cum. Supp. 1957, treats this power to contract and cooperate in the following language:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." (Underscoring supplied.)

Section 70.210, R.S. Mo. 1949, Cum. Supp. 1957, defines "political subdivision" as including counties. Attention is directed to the first underscored portion of Section 70.220, R.S. Mo. 1949, Cum. Supp. 1957, supra. The language "or with any private person, firm, association or corporation" constitutes the sole amendment made to that statute by Senate Bill 218, passed by the Sixty-Ninth General Assembly, and effective August 29, 1957. Such amendment is significant in view of the question posed in the request for this opinion. Section 70.220, supra, as it now stands, obviously confers authority on a county or counties to contract with any private person, firm, association or corporation for the purposes and subject to the limitations set forth in the statute.

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The rule with respect to "limitations" is found in the following language from Section 70.220, supra:

" * * ; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision."

In *Everett v. County of Clinton, Mo.*, 282 S.W.(2d) 30, 1.c. 35, the Supreme Court of Missouri dealt with powers of counties in the following language:

" * * the general rule in Missouri with regard to powers of counties is well stated in *King v. Maries County*, 279 Mo. 488, 249 S.W. 418, 420, as follows: 'It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. * * * This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. * * * ' And see *Blades v. Hawkins*, 240 Mo. 187, 195, 112 S.W. 979."

From the foregoing review, it may be reasonably concluded that any county in Missouri may contract singly or jointly with any public or private corporation, association or person for planning services, provided that the subject and objectives of such planning services involve a project within the scope of powers granted to such counties by statute. We now consider the objectives of the planning services as outlined in the question to be planning for general land use, including land use for industry, for homes, for recreation, for business, for streets and thoroughfares, and for utilities such as sewers, water gas and electricity.

Statistical information from the office of Secretary of State of Missouri discloses that Clay County is a county of the Second Class, and that Platte and Cass Counties are counties of the Third Class. Statutory powers of Second and Third Class counties pertaining to

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county planning and zoning are outlined in Sections 64.510 to 64.590, RSMo. Cum. Supp. 1957. Section 64.510, RSMo. Cum. Supp. 1957, provides:

"The county court of any county of the second or third class may, after approval by vote of the people of the county, provide for the preparation, adoption, amendment, extension and carrying out of a county plan for all areas of the county outside the corporate limits of any city, town or village which has adopted a city plan in accordance with the laws of the state which are not more than forty miles from the corporate limits of any city which now has or may hereafter have more than thirty-five thousand inhabitants, or all areas of any county which is adjacent to a county containing a city of more than four hundred and fifty thousand inhabitants. Upon the adoption of the county plan there is created in the county a county planning commission as hereinafter provided."

(Underscoring supplied.)

Viewing the underscored language appearing in Section 64.510, supra, it may be concluded that the counties of Platte, Clay and Cass, lying adjacent to Jackson County, are among the counties to which the statute is directed. It is within the framework of Sections 64.510 to 64.690, RSMo. Cum. Supp. 1957, that we must find any authority vested in the counties of Platte, Clay and Cass to engage in county planning or zoning. As a prerequisite to carrying out any of the authority granted in the statutes just mentioned, we find Section 64.530, RSMo. Cum. Supp. 1957, providing, in part, as follows:

"1. Before the county court of any such county shall adopt any plan or create any commission provided for in sections 64.510 to 64.690 it shall order the question as to whether or not the court shall adopt county planning or zoning submitted to the voters of the county at the next election to be called for that purpose.

* * * "

Once county planning or zoning has been sanctioned by a vote of the people, Section 64.540, RSMo. Cum. Supp. 1957, authorizes the county planning commission in the following language:

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"The commission may appoint such employees as it may deem necessary for its work and may contract with planners and other consultants for such services as it may require and may incur other necessary expenses. The expenditures of county funds by the county planning commission shall not be in excess of the amounts appropriated for that purpose by the county court. The commission shall have such other powers as may be necessary and proper to enable it to perform the duties imposed upon it by law."

The authority of the county planning commission to contract with planners and consultants for required services is clearly spelled out in the preceding quotation from Section 64.540, supra, and the only limitation placed upon the county planning commission with reference to obligation of funds is that the expenditures of county funds shall not be in excess of the amounts appropriated for that purpose by the county court.

In Section 64.550, RSMo. Cum. Supp. 1957, we find authority given to the county planning commission relative to a "master plan of the county", and we quote the pertinent language of such statute as follows:

"The county planning commission shall have power to make, adopt and publish an official master plan of the county for the purpose of bringing about coordinated physical development in accordance with the present and future needs. The official master plan shall be developed so as to conserve the natural resources of the county, to insure efficient expenditure of public funds and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants. Such official master plan may include, among other things, studies and recommendations relative to the location, character and extent of highways, railroads, bus, streetcar and other transportation routes, bridges, public buildings, schools, parks, parkways, forests, wild-life refuges, dams, and projects affecting conservation

Honorable Floyd R. Gibson

of natural resources. The county planning commission may adopt the official master plan in whole or in part and may subsequently amend or extend the adopted plan or portion thereof. * * * "

The power vested in the county planning commission by language quoted from Section 64.540, supra, "to make, adopt and publish an official master plan of the county", keyed as it is to the "health, safety, convenience, prosperity and general welfare of the inhabitants", is not a power to be curtailed without cogent reason, save and except in those instances where a statute has specifically treated a named prohibition. While publication and enforcement of a master official plan for the county under authority found in Section 64.550, RSMo. Cum. Supp. 1957, must of necessity be circumscribed by all statutory prohibitions found throughout Sections 64.510 to 64.690, RSMo. Cum. Supp. 1957, it cannot reasonably be said that the scope of planning services to be contracted for by the county planning commission may not encompass more than the official master plan to be adopted and published, so long as the planning aids in effectuating the plan ultimately adopted and published. The scope of planning services is well guarded by the power to contract for such services vested in the county planning commission.

From what has heretofore been said concerning the powers of counties to contract singly or jointly, and concerning the powers of a county planning commission operating within the confines of Sections 64.510 to 64.690, RSMo. Cum. Supp. 1957, it may be concluded that the counties of Platte, Clay and Cass in Missouri, upon the approval by the voters of each said county of the proposal to adopt county planning and zoning under Section 64.510, have authority to contract, singly or jointly, with a planning agency to formulate plans for general land use, including land use for industry, for homes, for recreation, for business, for streets and thoroughfares, and for utilities such as sewers, water, gas and electricity.

Questions three and four stated in the forepart of this opinion will be treated together since they involve statutory powers of the Missouri Commission of Resources and Development found outlined in Chapter 255, RSMo. 1949, as amended. The general purpose of the Division of Resources and Development is stated in the following language from Section 255.010, RSMo. 1949:

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"The division of resources and development of the department of business and administration is hereby created for the general purpose of advancing the economic welfare of the people through programs and activities to develop in a proper manner the state's natural resources and industrial opportunities pertaining to commerce, agriculture, mining, forestry, transportation, recreation, aviation and other matters intended to foster and develop gainful employment and the pursuit of happiness of all who now are or who may hereafter be residents of this state."

Section 255.040, RSMo. 1949, outlines the duties of the Commission of Resources and Development in the following language:

"It shall be the duty of the commission to:
(1) Investigate, assemble, develop and study, or cause to have investigated, assembled, developed and studied, all pertinent information available regarding the economic resources and industrial opportunities and possibilities of the state of Missouri, and the particular sections thereof, including raw materials, and products that may be produced therefrom; power and water resources; transportation facilities; the available markets, and the marketing limitations of the state; the availability of labor; the banking and financing facilities; the availability of industrial sites; the advantages of the state as a whole, and the particular sections thereof, as industrial locations, and such other fields of research and study as the commission may deem necessary;

(2) Formulate and adopt a plan or plans for the coordinated development, conservation and use of these resources in ways that will promote and advance the economic welfare of the people of the state; such plan or plans, as far as may be desirable and practicable, to be coordinated with the planning programs of cities, counties and areas in Missouri, with national planning, and with the planning of other states;

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(3) Encourage the location of new industrial enterprises in the state, the expansion of industries now existing within the state, and developments in new fields allied to such industries, and acquaint the people of Missouri with the industries located within the state, and the industrial opportunities existing in the state, and encourage closer cooperation between the various industries of the state themselves and with the people, by the use of legitimate educational and advertising mediums, and by solicitations of industrial and commercial enterprises;

(4) Investigate, study and undertake ways and means to promote and develop markets for Missouri products, and to promote the industrial use of agricultural, mineral and forest products;

(5) Encourage the development of recreational areas in the state, and encourage the traveling public to visit Missouri, by the dissemination of information within and without the state as to the recreational resources and advantages of the state, and its attractions and facilities for vacation and transient travel;

(6) Encourage the formation of local and sectional development committees throughout the state; make available to such committees and to municipalities, communities, the various political subdivisions of the state, private groups, bodies, organizations, associations and agencies such facts, data and information as may be useful and desirable in their efforts, to encourage the location of industries and commercial enterprises within this state, and in other ways to cooperate with the commission in carrying out the purposes of the chapter.

(7) Encourage the development of the aeronautical resources of the state and aid in an educational program related to aviation;

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(8) Do such other and further related acts as shall, in the judgment of the commission, be necessary and proper to carry out the purposes for which the commission is created."

The Missouri Commission of Resources and Development is given the power to make contracts in the following language found in Section 255.060, RSMo. 1949:

"In the performance of its duties, the commission is hereby empowered and authorized to make and enter into contracts, and to assume such other functions as are necessary to carry out the provisions of this chapter that are not inconsistent with this or other acts. The commission may make and enter into contracts with other boards, commissions, agencies and institutions of this state or other states, upon such terms as may be mutually agreed upon, to have such studies and research activities conducted as may be necessary and proper, the cost thereof to be paid out of funds which may be appropriated to the commission."

Sections 255.010, 255.040 and 255.060, RSMo. 1949, quoted above, disclose ample authority vested in the Missouri Commission of Resources and Development to carry out planning services in different areas of the state, or to have those planning services carried out by others through contractual agreements. However, Section 255.060, RSMo. 1949, supra, does provide that the costs attending such contractual agreements are to be paid out of funds which may be appropriated to the Commission. No prohibition has been discovered which would bar the Missouri Commission of Resources and Development from accepting funds from either the Federal Government or a private agency, or from both sources, in order to carry out or have carried out planning services heretofore referred to, but receipt of such funds would be subject to the provisions of Sections 33.080 and 136.010, RSMo. 1949, making mandatory the deposit of such funds in the state treasury, subject to later appropriation by the Legislature for the purposes for which the funds were received. Such restrictions on the acceptance of the funds by the Missouri Commission of Resources and Development might result in the funds not being contributed under Federal rules or policy of the private agency involved.

Honorable Floyd R. Gibson

An answer to the second question posed in the forepart of this opinion has been reserved until a ruling concerning questions three and four was given, and an opportunity had to refer to Sections 33.080 and 136.010, RSMo. 1949. In those cited statutes, we do find an exception to the rule requiring that the funds of which we are speaking be deposited in the state treasury and be subject to appropriation by the Legislature. In Section 33.080, RSMo. 1949, the exception reads as follows:

" * * *; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source: Appropriations, gifts or grants from the federal government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly."

The exception found in Section 136.010, RSMo. 1949, is identical with that found in Section 33.080, RSMo. 1949, quoted above. It is within the framework of the exceptions found in the statutes just referred to that we may find a feasible power in the Community Facilities Service Department of the University of Missouri to accept local matching funds for planning in metropolitan areas, such matching planning funds to be obtained from the Metropolitan Area Planning Council in an effort to qualify for and secure Federal funds to use for metropolitan planning.

It is not the purpose of this opinion to rule the powers of the Community Facilities Service Department of the University of Missouri in regard to eligibility to receive the funds in question or to function in relation to any plan involving such funds. Until the University of Missouri, through its governing body, evinces doubt as to the authority to be exercised by one of its single administrative units which is seeking to qualify to receive private or Federal funds, this office feels that the Federal governmental agency furnishing funds and making the over-all plan workable should determine the qualifications of the recipient of the funds.

Honorable Floyd R. Gibson

CONCLUSION

It is the opinion of this office (1) that the counties of Platte, Clay and Cass in Missouri have authority to contract, singly or jointly, with a planning agency to formulate plans for general land use, including land use for industry, for homes, for recreation, for business, for streets and thoroughfares, and for utilities such as sewers, water, gas and electricity; (2) that the Missouri Commission of Resources and Development has authority to carry out area planning services in different areas of the State, or to contract for such planning services to be carried out by others, so long as the costs of such planning services are paid out of funds which may be appropriated by the Legislature, and such appropriated monies may include funds from either the Federal Government or a private agency, or from both sources; and (3) that the Community Facilities Service Department of the University of Missouri appears to be eligible to accept local matching funds for planning in metropolitan areas, such matching funds to be obtained from the Metropolitan Area Planning Council, in an effort to qualify for and secure Federal funds to use for metropolitan planning, with the Federal agency making such funds available being the sole judge of the qualifications of the recipient of the funds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

J.L.O.M.:om

SOFT DRINKS AND BEVERAGES:
LICENSES:



A manufacturer of syrups and concentrates used in the concoction of soft drinks and beverages is not required to secure a license from the Division of Health. Such products, however, and the place of their manufacture, and or processing, are not exempt from the operation of the General Food Inspection and Sanitation Law of this state.

April 7, 1958

Honorable H. M. Hardwicke
Acting Director, Division of Health
State Office Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"We have recently received a letter from Mr. B. R. Murphy, President, Nesbitt Fruit Products, Inc., 2946 East Eleventh Street, Los Angeles 23, California. In his letter Mr. Murphy requests that clarification be made as to whether or not their proposed food manufacturing establishment in Kansas City would be subject to the Beverage Inspection Act of Missouri (Chapter 196, Sections 196.365 to 196.445). Mr. Murphy contends that the concentrates and syrups which they intend to manufacture in Kansas City, Missouri, are not beverages and the Beverage Inspection Act of Missouri should not apply to his proposed operation. These concentrates and syrups are not in a form for consumption; but are to be used as constituents of finished beverages.

"We would appreciate an official opinion concerning the following:

"1. Does this type of operation require a Beverage License from the State of Missouri?"

Honorable H. M. Hardwicke

Your first question is: Whether the type of operation set forth by you above requires a beverage license from the state of Missouri.

Section 196.365, RSMo 1949, reads as follows:

"1. It shall be unlawful to make, manufacture, or in any manner produce any soft drinks or beverages, excepting malt beverages, without first obtaining a license from the division of health, as in sections 196.365 to 196.445 required.

"2. The term 'soft drinks' as used in sections 196.365 to 196.445 shall be held to mean and include all beverages of every kind manufactured or sold in this state, which shall be understood to include those containing less than one-half of one per cent of or no alcohol, including carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes.

"3. Application for such license shall be made to the division of health on a blank prescribed by the division for that purpose. Such license shall expire on the thirtieth day of June next following the day of issuance thereof."

For a definition of "beverage" we turn to the case of *United States v. Robason*, 38 Fed. Supp., 991. At l.c. 992, the court states:

"Webster's New International Dictionary, Second Edition, (1940), defines the word 'beverage' as:

"'Liquid for drinking; drink; usually, drink artificially prepared, and of an agreeable flavor; as, an intoxicating beverage.

Honorable H. M. Hardwicke

"2. Specif., any of various drinks, such as weak beer, or the diluted juice of fruit, sugar cane, ginger, etc."

From the definition of "soft drinks," as used in Section 196.365, supra, and the definition of "beverages," as defined in the Robason case, it seems clear that the license which is required by Section 196.365, is as to products which are ready for consumption. From your letter of inquiry it is clear that the products which you have in mind, to wit, concentrates and syrups, are not ready for human consumption at the time they leave the manufacturing plant, but are simply products which will be sent elsewhere where, when properly compounded with other ingredients, will be sold at retail for human consumption. For this reason it seems clear to us that the type of operation contemplated by you does not require a beverage license.

The food products here under consideration, and the place of their manufacture and/or processing, are not exempt from the operation of the General Food Inspection and Sanitation Law of this state.

CONCLUSION

A manufacturer of syrups and concentrates used in the concoction of soft drinks and beverages is not required to secure a license from the Division of Health. Such products, however, and the place of their manufacture, and or processing, are not exempt from the operation of the General Food Inspection and Sanitation Law of this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

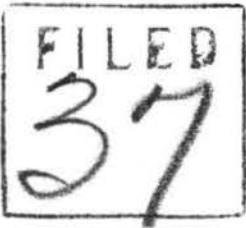
Yours very truly,

John M. Dalton
Attorney General

HPW:lc,vlw

COUNTY HEALTH CENTERS: Sections 205.010 to 205.155 RSMo 1949, as amended, do not authorize the circulation of petitions in county submitting to a vote of the people a proposition to cut down a county health unit tax of ten cents, to five cents, and put that portion of the reduced levy into an indigent fund to be disbursed by a board to be appointed by someone or elected as the county board of health center trustees is elected.

April 24, 1958



Honorable Dewey L. Hankins
Member, Missouri House of Representatives
Cassville, Missouri

Dear Mr. Hankins:

This opinion is in answer to a question you recently submitted involving an annual levy in Barry County for the county health center. The question reads as follows:

"1. Can we circulate petitions and bring it to a vote to cut down the County Health Unit tax of 10¢ to 5¢ and put this 5¢ in an Indigent Fund to be disbursed by a board to be appointed by someone or elected as the County Health Board is."

Section 1, Article X, Missouri's Constitution of 1945, provides:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

The foregoing constitutional provision is clarified by the following language from State ex rel. Clinton County v. The Hannibal & St. Joseph Railroad Company, 87 Mo. 236, 1.c. 239:

"The power of taxation is a sovereign right which belongs alone to the state, and which can only be exercised in pursuance of laws passed by the legislature for the purpose."

The purpose for which the county levies a tax for a county public health center is clearly disclosed by the following language from Section 205.010 RSMo Cum. Supp. 1957:

Honorable Dewey L. Hankins

" * * * for the establishment, maintenance, management and operation of a county health center and the maintenance of the personnel required for operation of the health center, * * *."

Section 205.020 RSMo Cum. Supp. 1957, discloses what immediate disposition is to be made of the tax funds levied and collected for a county public health center, in the following language:

- "2. If a two-thirds majority of the votes cast at such election on the proposition so submitted, shall vote in favor of such tax, the county court shall proceed to levy and collect such tax and deposit same in the county treasury to the credit of the health center fund and such fund shall be expended as hereinafter provided."

Section 205.045 RSMo Cum. Supp. 1957, treats the disposition of county health center funds in the following language:

"* * * All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees. * * *"

Power to raise or lower the annual rate of taxation for a county health center within the maximum rate voted by the people is found in the following language of Section 205.045 RSMo Cum. Supp. 1957.

"In any county in which a county health center has been established, the rate of tax which has been authorized by the vote of the people of the county shall continue as the maximum rate, and the board of health center trustees shall determine annually the rate of the tax levy up to but not exceeding this maximum."

A county public health center established pursuant to authority found in Sections 205.010 to 205.150 RSMo 1949, as amended, is a creature of statute. Its formation and powers are prescribed by statute. It may be appropriately referred to as an instrumentality

Honorable Dewey L. Hankins

of government, and in measuring its powers it may be held to the rule applicable to counties, such rule being referred to in the following language from *Ralls County Court v. U. S.* 105 U. S. 733, 26 L. Ed. 1220, 1.c. 1222:

"It has been many times decided that county courts in Missouri, while acting as the governing bodies of their counties, which are nothing more than political subdivisions of the State, have no implied powers. Authority must be conferred on them by law to act, or they cannot act at all. This is not peculiar to the county officials of Missouri. The same principle applies to all municipal organizations in all the States, and in this respect it matters but little whether the organization exists as a full corporation or a quasi corporation. The point is that all such organizations for local government, by whatever name they may be called, have only such powers as the Legislatures of their respective States see fit to delegate to them. But all powers that are delegated may be exercised, in any proper way and at all proper times." (Emphasis supplied.)

In reviewing the statutes applicable to county health centers, Sections 205.010 to 205.155 RSMo 1949, as amended, no expressed or implied power is found authorizing residents of a county to circulate petitions for the purpose of submitting to a vote of the people a proposition to cut down a county health unit tax of ten cents to five cents and put that portion of the reduced levy into an indigent fund to be disbursed by a board to be appointed by someone or elected as the county board of health center trustees is elected.

CONCLUSION

It is the opinion of this office that statutes applicable to county health centers, Sections 205.010 to 205.155 RSMo 1949, as amended, do not authorize the circulation of petitions submitting to a vote of the people a proposition to cut down a county health unit tax of ten cents, to five cents, and put that portion of the reduced levy into an indigent fund to be disbursed by a board to be appointed by someone or elected as the county board of health center trustees is elected.

Honorable Dewey L. Hankins

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'H:cm

BUREAU OF VITAL STATISTICS:

Upon the offer of satisfactory proof a registrar of vital statistics may issue a new

birth certificate in the new name of a legitimated child; the registrar of vital statistics may not refuse to accept a birth certificate simply because it shows upon its face that the father of the child is not the husband of the mother.



May 1, 1958

Dr. H. M. Hardwicke
Acting Director
Division of Health
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"This office respectfully requests an opinion upon the following questions relating to the vital statistics program of the state of Missouri:

"My first question is: Are the powers of the registrar of vital statistics strictly administrative or is the registrar also vested with the authority to exercise discretionary powers, that is to say, may the registrar exercise his independent judgment and, if so, to what extent?

"My second question is: Assuming that the Bureau of Vital Statistics has a birth record on file showing the legal husband of the mother at the time of birth as the father of the child, does the registrar of vital statistics have the discretion to amend that record by removing the name of the aforesaid husband and substituting the name of another man who claims to be the father of the child; whereas, prior to this substitution, on the face of the record, the child was legitimate?

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"My third question is: Does the registrar of vital statistics have the authority to remove the name of the father of a child when this child appears, on the face of the certificate, to be legitimate, and not add the name of another man, thus, rendering a child illegitimate who prior to the amendment, on the face of the record, appeared to be legitimate.

"My fourth question is: When a birth certificate is received in the Bureau of Vital Statistics, which contains the name of the father of a child, but because of other inconsistent statements, it can be assumed that the father is not the husband of the mother, can the registrar ask that this record be replaced and a new record filed which does not contain facts relating to the father of the child.

"Enclosed you will find a letter from Mr. Gilbert Carter, dated February 28, 1958. Mr. Carter asked that if an attorney general's opinion relating to my second question was requested, I also submit his letter to you. He feels that your office would appreciate having the benefit of the research that he has done relating to this matter."

Your first question is, in substance, whether the powers of the registrar of vital statistics are strictly administrative, or whether the registrar has authority to exercise discretionary power, and if so, to what extent.

The general nature of this question makes it impossible for us to give an answer which would be sufficiently definite to be of any assistance to you. Perhaps our discussion of your following three questions will shed some light upon the first.

Your second question, set forth above, is, as you indicate, predicated upon the following fact situation: A married woman has a child by a man not her husband. Subsequently, she divorces her husband and marries the man who is the natural father

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of her child. The child's birth certificate was filed in the office of the registrar of vital statistics giving the child the surname of the mother's husband at the time of the birth of the child, and showing that the mother was married to the man who was her husband at the time the child was born. Now the mother and her present husband, the natural father of the child, request the registrar of vital statistics to amend the birth certificate of the child by removing the name of the husband of the mother at the time the child was born and substituting therefor the name of the man who is the natural father of the child and who is now married to the mother. The question is whether this can be done.

Section 193.260 RSMo 1949, reads:

"In cases of legitimation the state registrar upon receipt of proof thereof shall prepare a new certificate of birth in the new name of the legitimated child. The evidence upon which the new certificate is made and the original certificate shall be sealed and filed and may be opened only upon order of court."

We will begin our discussion of this matter by observing that the strong presumption is that a child who is born to a husband and wife is presumed to be the child of such husband and wife. In the case of *Ash v. Modern Sand and Gravel Company*, 122 S.W. 2d 45, at l.c. 50, the St. Louis Court of Appeals stated:

"* * * Every child born in wedlock is presumed to be legitimate. Public policy sanctions this view. *Bower v. Graham*, 285 Mo. 151, 225 S.W. 978; *Gates v. Seibert*, 157 Mo. 254, loc. cit. 272, 57 S.W. 1065, 80 Am. St. Rep. 625; *Busby v. Self*, 284 Mo. 206, 223 S.W. 729.

"Such presumption in favor of the legitimacy of children born in wedlock is the strongest known to the law, and the courts in their righteous zeal to protect the innocent offspring will not permit this presumption to be overthrown unless there is no judicial escape from such a malign

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conclusion. Nelson v. Jones, 245 Mo. 579, 151 S.W. 80; Maier v. Brock, 222 Mo. 74, loc. cit. 100, 120 S.W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; Jackson v. Pahlen, 237 Mo. 142, 140 S.W. 879; Stripe v. Meffert, 287 Mo. 366, 229 S.W. 762; 7 C.J., Par. 6, p. 940.

"To overthrow this presumption the evidence must show conclusively that the husband, by reason of absence or otherwise, could not have had sexual intercourse with the wife at the beginning of any reasonable period of gestation. Drake v. Milton Hospital Ass'n, 266 Mo. 1, 178 S.W. 462. * * *"

However, as will be noted by the above case, this presumption can be overcome and one of the means by which it can be done is a showing that the husband, by reason of absence, could not have had sexual intercourse with the wife at the beginning of any reasonable period of gestation. In the situation stated the wife alleges that her husband had been absent for several years before the child in question was born.

Our second proposition is that a child born during wedlock may be illegitimate if it be shown that the husband of the mother prior to and during the period of gestation and at the time of the birth of the child was not the natural father of the child. In the case of State v. Coliton, 17 N.W. 2d 546, at l.c. 548, et seq., the Supreme Court of North Dakota stated:

"For the purposes of the demurrer, the defendant admits the complainant is a married woman and that he is the father of her child, begotten and born while she was married to another. It becomes necessary therefore to determine the scope of the phrase, 'a child born out of wedlock.' Under the statute cited, may a child, born as stated, be said to be 'born out of wedlock'?"

"The gist of appellant's argument is that owing to the existing marriage relations a child born to the wife during that time can not be said to be 'born out of wedlock.'"

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"Such contention unduly extends the meaning of the term 'wedlock.' Much of the confusion arises because of the presumption of legitimacy where the mother is married and the difficulty in obtaining proof to dispute this presumption as well as the statutory limitations as to who may raise the question. So far as the child is concerned, it is immaterial whether it is designated as illegitimate, or bastard, or born out of wedlock. In all such cases, it is illegitimate.

"The extreme difficulty of rebutting this presumption and its transition from that of a practical conclusiveness to the modern trend toward a sane and reasonable ascertainment of facts is clearly set forth in the opinion of the New York Court of Appeals --In re Findlay, 253 N.Y. 1, 170 N.E. 471-- written by Judge Cardozo. Therein, the court reviewed the history of the application of this presumption and in a rather exhaustive opinion traced the history of the change in the quantum of proof necessary to rebut it. Throughout the decision runs the undisputed theory the presumption never was or is conclusive.

"In harmony with American jurisprudence, this state has always held that 'all children born in wedlock are presumed to be legitimate' (Sec. 4420, C.L., and 14-0901, Revised Code 1943) as is also a child born to a married woman within ten months of the dissolution of the marriage (Sec. 4421, C.L., 14-0902, Revised Code 1943). This is a presumption which may be rebutted, but this 'presumption of legitimacy can be disputed only by the husband or wife or the descendant of one or both of them. Illegitimacy in such case may be proved like any other fact.' Section 4422, C.L. 14-0903, Revised Code 1943. The status of wedlock exists between them. The presumption is that it is their child and therefore born in wedlock. See State v. Fury, 53 N.D. 333, 205 N.W. 877, 878. But it may be shown

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that the child was not born to them in the status of wedlock that existed between them and is therefore illegitimate.

"To protect society, this limitation on the attack of presumption is made:

"If neither the husband nor the wife to an existing marriage desires to raise any question of the legitimacy of a child born during its existence, the best interests and welfare of society will be promoted if the state likewise declines to intervene in raising that question." Ex parte Madalina, 174 Cal. 693, 164 P. 348, 350, 1 A.L.R. 1629.

"In the case at bar, the legitimacy is disputed by the wife, the mother of the child. While under the common law, neither husband nor wife could bastardize a child born during wedlock, the statute removes this difficulty. As said in Vincent v. Koehler, 284 N.Y. 260, 30 N.E. 2d 587, in the absence of statute, neither husband nor wife was a competent witness in such case, whatever would be the form of the legal proceedings or whoever would be the parties. Our statute already quoted changes this, but limits this power to husband, wife, or any descendant of either. Such was our statute when the Uniform Illegitimacy Act, Comp. Laws Supp. 1925, § 10500a1 et seq., was adopted and the term 'born out of wedlock' used.

"There has never been any question but what a married woman may give birth to an illegitimate child which is therefore termed bastard. People v. Gleason, 211 Ill. App. 380; Stripe v. Meffert et al., 287 Mo. 366, 229 S.W. 762. This applies also to cases where the parents of the child have living spouses. Lewis v. Crowell, 210 Ala. 199, 97 So. 691; McLoud v. State, 122 Ga. 393, 50 S.E. 145. * * *

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In the case of *Stripe v. Meffert*, 229 S.W. 2d 762, a case referred to in the *Coliton* case, the Missouri Supreme Court, at l.c. 770 stated:

"We are all the more persuaded that there must be a bona fide marriage by at least one of the parents under said section 342 of our statutes by reason of the provisions of the immediately preceding section 341, R.S. 1909, which is as follows:

"'If a man, having by a woman a child or children, shall afterward intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimated.'

"This section covers the case of an adulterine bastard, or a child born of a married woman and a man not her husband, with whom she has committed adultery. In such case, the question of good faith in the relations of the parents at the time the child was conceived or born is not regarded--though their sins be as scarlet--yet, if they afterwards contract a legal marriage and recognize their children, such children shall stand legitimate before all the world. *Busby v. Self*, 223 S.W. 729. * * *

The same holding is made in the case of *Neuchiller v. Neuchiller*, 114 N.E. 2d 900; *Nevins v. Gilliland*, 234 S.W. 818, and numerous other cases which could be cited. Therefore, it would clearly appear that a child born in wedlock may be illegitimate.

Section 474.070 RSMo Cum. Supp. 1957 reads:

"If a man, having by a woman a child or children, afterward intermarries with her and recognizes the child or children to be his they are thereby legitimated."

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That is what happened in the situation which we are considering, i.e., the natural father of the child has married the mother of the child subsequent to her divorce and has recognized the child to be his, which, according to Section 474.070, supra, legitimates the child. Such is the construction put upon this section by *Nevins v. Gilliland*, cited above; *Drake v. Milton Hospital Association*, 178 S.W. 476; *Lowtrip v. Green*, 252 S.W. 2d 524; *Canfield v. Porterfield*, 292 S.W. 2d 85; *Busby v. Self*, cited above and numerous others.

We now have a situation in which the child, in the situation under consideration, was illegitimate, although born to a woman during the time of her marriage; but which child has been legitimated by the marriage of the natural father with the mother subsequent to her divorce and the recognition by the current husband that the child is his. Our question then is whether under such a fact situation Section 193.260 applies. That section holds that "in case of legitimation . . . , which we here have, "the state registrar upon receipt of proof thereof . . . shall prepare a new certificate of birth in the new name of the legitimated child. The section goes on to state that the evidence upon which the new certificate is made, together with the original certificate "shall be sealed and signed and may be opened only upon order of court."

Therefore, our answer to your second question is that where proof is adduced which satisfies the registrar of vital statistics that a child born in wedlock was in reality not the child of the husband of the mother, but was the child of another man and was, therefore, illegitimate, and that subsequent to the birth of the child the mother divorced her husband and married the natural father of the child, who acknowledges his paternity, that the registrar may prepare a new certificate of birth in the new name of the legitimated child. This does not, as your question assumes, render the child illegitimate, but is rather simply a process in its true legitimation.

In respect to your third question we enclose a copy of an opinion rendered April 21, 1953, to Honorable James R. Amos, Director, Division of Health, which we believe answers your third question.

Your fourth question is whether or not when a birth certificate is received in the bureau of vital statistics, which contains the name of the father of the child, but because of other inconsistent statements, it can be assumed that the father is not the husband of the mother, whether the registrar can ask that this record be replaced, and a new record filed which does not contain facts relating to the father of the child.

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We do not believe that the registrar may do so because we do not find in the statutes any authority for him to refuse to accept a birth certificate simply because it lists as the father of the child a man who is not the husband of the mother, and to require that a new certificate be filed in which no father is named. This would amount to the refusal to accept a complete and presumably correct certificate and the requirement that a new certificate be filed in lieu thereof.

In this connection we note Section 193.170 RSMo 1949 which reads:

"Certificates filed within six months after the time prescribed therefor shall be prima facie evidence of the facts therein stated. Data therein pertaining to the father of a child are prima facie evidence only if the alleged father is the husband of the mother; if not, the data pertaining to the father of a child are not evidence in any proceeding adverse to the interests of the alleged father, or of his heirs, next of kin, devisees, legatees or other successors in interest, if the paternity is controverted."

It would seem that this section clearly contemplates that certificates may be filed in which a man who is not the husband of the mother is listed as the father of the child.

CONCLUSION

It is the opinion of this department that upon the offer of satisfactory proof a registrar of vital statistics may issue a new birth certificate in the new name of a legitimated child; that the registrar of vital statistics may not refuse to accept a birth certificate simply because it shows upon its face that the father of the child is not the husband of the mother.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

Enclosure - James F. Amos, M.D.
April 21, 1953

HPW:vlw

MILK AND MILK PRODUCTS:
ORDINANCE OF CITY OF
ST. LOUIS:

Paragraphs B-11 and B-12 of Section 1 of Ordinance No. 47605 of the City of St. Louis, as amended by Substitute Board Bill No. 472, relating to milk sanitation and the regulation of the production, handling, and sale of milk and milk products, are invalid because of their conflict with Section 196.705, RSMo 1949; a product prepared by adding hydrogenated vegetable fat, vanilla, and gelatin base stabilizer to cream containing 18% milk fat is a lawful product under the provisions of Section 196.705, RSMo 1949, if it is not in imitation or semblance of milk, cream, or skim milk.

H. M. Hardwicke, M. D.
Acting Director
Division of Health of Mo.
Jefferson City, Missouri

September 2, 1958



Dear Sir:

Your recent request for an official opinion reads:

"Attached is information from the files of the Missouri Division of Health regarding the production, sale and attempted grading of pasteurized imitation whipping cream manufactured by the Lange Topping Company, St. Louis, Missouri. A brief history of the situation is as follows:

In 1955 the St. Louis Health Division attempted to regulate the manufacture of imitation creams by amendment to the Ordinance and Regulations Governing the Handling and Sale of Fluid Milk and Fluid Milk Products, City of St. Louis, Missouri. It was discovered that the Sta-Whip Sales Company, presently operating as the Lange Topping Company was manufacturing a product consisting of 18% cream to which had been added vegetable fat, vanilla and a stabilizer. Efforts to establish sanitation standards for the vegetable fat, vanilla and stabilizer were not accomplished by the St. Louis Health Division and in March of 1958 the Board of Alderman of the City of St. Louis amended the Milk Ordinance of that city to define imitation creams and to provide for the grading of imitation creams.

In June of 1958 the St. Louis Health Division submitted to the Bureau of Food and Drug Inspection, Missouri Division of Health a proposed carton in

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which this Grade A imitation whipping cream was to be distributed. In reviewing the labeling of the carton, the Bureau of Food and Drug Inspection was of the opinion that the product was in violation of Section 196.705, Revised Statutes of Missouri, 1949, and that the proposed grading of such a product was not in compliance with the Division of Health Regulations Governing the Production and Handling of Fluid Milk and Fluid Milk Products, as filed with the Secretary of State.

With permission of the St. Louis Health Division, the Lange Topping Company was contacted directly regarding this matter and a hearing on the subject was held. As a result of the hearing, Mr. Lange's attorney, Mr. Ray T. Dreher, submitted to the Bureau of Food and Drug Inspection his analysis of the State Statutes and Regulations as they apply to this product.

We are requesting your review of the enclosed material consisting of the complete files of the Division of Health regarding this matter and further requesting your opinion in reference to the following two questions:

(1) Are paragraphs B-11 and B-12, Section 1 and paragraph K, Section 1 and Substitute Board Bill #472, all of which recognize the manufacture, production and grading of imitation creams, within the legislative jurisdiction of the Board of Aldermen of the City of St. Louis when considered in light of Section 196.705 and The Regulations of the Division of Health Governing the Production and Handling of Fluid Milk and Fluid Milk products?

(2) Is a product prepared by adding hydrogenated vegetable fat, vanilla and gelatin base stabilizer to cream containing 18% milk fat a lawful product under the provisions of Section 196.705, Revised Statutes of Missouri, 1949?

Your early attention to this request will be appreciated."

H. M. Hardwicke, M. D.

The two sections of the St. Louis ordinances about which you inquire, B-11 and B-12, as originally promulgated by the city of St. Louis read:

"B-11. Imitation Creams--Imitation creams are products which result from the combination of milk, dried milk constituents, or concentrated milk constituents with water, cream, milk, or skimmed milk and non-milk fat and which comply in total fat content with the milk fat content of the various creams defined herein.

"B-12. Imitation Half and Half--Imitation half and half is a product which results from the combination of milk, dried milk constituents, or concentrated milk constituents with water, cream, milk, or skimmed milk and non-milk fat and which contains not less than 11 1/2% total fat content."

The above sections are found in Section 1 of Ordinance 47605 which amends Chapter 40 of the Revised Code of St. Louis, City of St. Louis, Missouri. Section 3 of such ordinance provides:

"It shall be unlawful for any person to bring into, send into, or receive into the City of St. Louis, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk products defined in this ordinance, who does not possess a permit from the Board of Public Service so to do."

Section 4 of the above ordinance provides that all containers enclosing milk products, as defined in Section 1 of such ordinance are to have the containers marked with the name of the contents as given in such definition in the ordinance.

As we stated above, Sections B-11 and B-12 are found in Section 1 of such ordinance. Therefore, it appears that, under the ordinances of St. Louis any product as defined in Chapter 40 of the revised code of St. Louis must be labeled according to the definition found therein and a permit must be secured before

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such product can be sold. It follows therefore that the product which conforms to the definition of imitation cream or imitation half and half, sold in St. Louis, must be labeled with such names.

In 1958 the City of St. Louis amended the aforesaid B-11 as follows by Substitute Board Bill No. 472:

"An Ordinance amending Chapter 40 of Volume 1 of the Revised Code of St. Louis, 1958, as amended by Ordinance 47605, relating to milk sanitation and the regulation of the production, handling and sale of milk and milk products by repealing Article I, Section 1, sub-section B-11, and all ordinances in conflict herewith and enacting in lieu thereof a new section to be known by the same number and relating to the same subject; and by adding a new paragraph at the end of Article One, Section 3, and containing an Emergency Clause.

BE IT ORDAINED BY THE CITY OF ST. LOUIS,
as follows:

Section One. Chapter 40 of Volume 1 of the Revised Code of St. Louis, 1948, as amended by Ordinance 47605, relating to milk sanitation and the regulation of the production, handling and sale of milk and milk products is hereby amended by repealing Article 1, Section 1, sub-section B-11, and enacting in lieu thereof a new subsection to be known by the same number and relating to the same subject, which shall read as follows:

Sub-section B-11. IMITATION CREAMS--
Imitation creams are products which result from the combination of milk, dried milk constituents, or concentrated milk constituents with water, cream, milk, or skimmed milk and approved harmless non-milk fat and which comply in total fat content with the milk fat content of the various creams defined herein." (Emphasis ours.)

Section 196.705, RSMo 1949, to which you refer, reads:

"It shall be unlawful for any person, firm or corporation, by himself or itself, his or its

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agent or servant, or as the servant or as agent of another to manufacture, sell or exchange, or have in possession with the intent to sell or exchange, any milk, cream, emulsified cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives thereof, or any of them, to which has been added any fat or oil other than milk fat, either under the name of said product or articles of the derivatives thereof, or under any fictitious or trade name whatsoever."

It will be noted that the above section makes unlawful the sale or having in possession with intent to sell milk in various enumerated forms "to which has been added any fat or oil other than milk fat . . . "

It will also be noted that B-11 as amended provides that imitation creams are products which result from the combination of milk "and approved harmless non-milk fat."

In your first question you really ask two questions, the first of which is whether paragraphs B-11 and 12, supra, are in conflict with Section 196.705, supra, and, if so, whether B-11 and 12 can stand.

In 1938, in the case of Poole & Creber Market Co. vs. Bre-shears, 125 S.W. 2d 23, the Missouri Supreme Court gave extensive consideration to what is now Section 196.705, supra, and what was then Section 12408. At l.c. 27 the court stated:

"In our opinion the statute is not in contravention of the constitutional provisions referred to. It was enacted in the exercise of the police power for the purpose, as indicated by its title, of protection of the public health and the prevention of fraud, subjects clearly within the scope of that power. * * *"

The above case established the constitutionality of what is now Section 196.705.

In 1940 the Missouri Supreme Court, en banc, rendered its opinion in the case of State vs. Carolene Products Co., 144 S.W. 2d 153. This case took note of the Poole and Creber case noted above and stated (l.c. 155 et seq.):

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"In the case of Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W. 2d 23, the constitutionality of the above named sections was before us, but not their construction. In that case, the plaintiff who had been selling the respondent's products, which at that time did not contain vitamins A and D, sought to enjoin the enforcement of these sections because they were unconstitutional. We said (125 S.W. 2d loc. cit. 25): 'Upon final hearing the circuit court found for the defendants, holding the statute valid, and dismissed plaintiff's bill. Plaintiff appealed. The question presented here is whether or not said statutory provisions are valid. If they are the judgment below was right.' (Italics ours.) Thus, we see that the Poole & Creber case is no aid to us in construing the filled milk statutes of this state.

"Standing alone and literally construed, Section 12408, supra, prohibits the sale of any milk, whole or skim milk to which has been added any fat or oil other than milk fat. Section 12409 defines filled milk to mean 'any milk, cream or skim milk, * * * to which has been added * * * any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream or skim milk * * * Provided that the above definition shall not include any distinctive proprietary food compound, not readily mistaken in tests for milk or cream, or for evaporated, condensed or powdered milk or cream: Provided, however, that such compound is prepared and designed for feeding infants and young children and customarily used on the order of a physician; is packed in individual cans containing not more than sixteen and one-half ounces and bearing the label in bold type, that the contents are to be used only for said purposes; is shipped in interstate or foreign commerce exclusively to physicians, wholesale or retail druggists, orphan asylums, child welfare associations, hospitals and similar institutions and generally

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distributed by them" (*Italics ours.*)

"[1] So, under Section 12409, *supra*, skim milk to which has been added fat or oil other than milk fat can be sold, provided the resulting product is not 'in imitation or semblance of milk, cream or skim milk.' Even milk to which fat or oil is added and which is in imitation or semblance of milk, cream or skim milk can be sold, provided it is a 'distinctive proprietary food compound * * * designed, for feeding infants and young children' and customarily used on the order of a physician, packed in cans containing not more than sixteen and one-half ounces, and shipped in interstate or foreign commerce exclusively to physicians, druggists, orphan asylums, child welfare associations, etc. Section 12410 deals with emulsified cream which is not involved in this case. Section 12411 declares 'that filled milk, and emulsified cream as herein defined, are adulterated articles of food injurious to the public health.' Section 12412 is a penalty section.

"We will undertake first to determine the intention of the Legislature in passing the house bill of 1923.

"[2,3] It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent. *State v. Wipke et al.*, Mo. Sup., 133 S. W. 2d 354; *State ex rel. Kansas City Power & Light Co. v. Smith*, 342 Mo. 75, 111 S.W. 2d 513; *Holder v. Elms Hotel Co.*, 338 Mo. 857, 92 S.W. 2d 620, 104 A.L.R. 339. 'It is the duty of the court, in construing statutes which appear to be in conflict, to reconcile them, if possible, with the general legislative purpose.' *Dysart v. City of St. Louis*, 321 Mo. 514, 11 S.W. 2d 1045, loc. cit. 1050, 62 A.L.R. 762. With these rules of construction in mind, we believe the apparent conflict between Section 12408, *supra*, and Section 12409

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can be reconciled, and reading these two sections together we have come to the conclusion the Legislature sought to prohibit the sale, manufacture or exchange of milk, or skim milk blended with fat or oil other than milk fat when the resulting product is in imitation or semblance of milk."

At l.c. 157 the Court stated:

"Nor do we find from the return that the respondent's products are sold in imitation or semblance of milk, but on the contrary these products are a unique cooking compound and are not sold as or for evaporated milk.

"Not only does the label on respondent's products plainly state that it is not to be sold for evaporated milk and that it is 'especially prepared for coffee, baking and for other culinary purposes,' but the return also states that respondent's dealers do not sell these products for evaporated milk. From the facts above set out we are unable to see how the buying public could be deceived into thinking that they were buying milk when purchasing respondent's products."

In the case of State vs. Hershman, 143 S.W. 2d 1025, at l.c. 1026, the Missouri Supreme Court took note of the case of State vs. Carolene Products Co., supra, and adopted the result reached therein in the following language:

"Under the construction placed upon the statutes in that opinion it was held upon a consideration of them as a whole that the legislative intent was 'to prohibit the sale of filled milk, and that filled milk is only that milk to which has been added fat or oil other than milk fat "so that the resulting product is in imitation or semblance of milk, cream or skim milk," and that if the product does not come within the statutory definition of filled milk it can be lawfully sold in this state.'" [Italics mine.]

From the above it will be seen that the Missouri Supreme Court has reached two conclusions regarding this matter: First that Section 196.705 is constitutional and is not in conflict with any

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other statutes of Missouri; and second, that any product which is "in imitation" of a milk product is contrary to the aforesaid Section 196.705. Section B-11 is entitled "Imitation Creams." The product itself (See photostatic copy attached) is labeled in large, black, capital letters, "IMITATION WHIPPING CREAM," and that it is to be used as "Cake Whip." Since the Supreme Court of Missouri has held in the Carolene Products case, extensively cited above, that a product which would come within the definition of imitation cream or imitation half and half can be legally sold in this state so long as it is not an imitation of or semblance of milk or cream, it would appear that the requirement of the city ordinance that the product before being sold in St. Louis must be labeled imitation, is invalid because of its conflict with the state law as enunciated in the Carolene and Hershman cases. The gist of the invalidity is that the ordinance requires a product to be labeled an imitation whereas the Supreme Court has held that it is a legal product unless it is an imitation.

In reply to your second question it would be our opinion that the product about which you inquire is a lawful product so long as it is not in imitation or semblance of milk or cream and that it is not in imitation or semblance of milk or cream if it is not so labeled, but is labeled in accordance with the principles laid down in the Carolene case.

The fact that the City of St. Louis is a charter city would not in any way place it in a different position with respect to the necessity of its ordinances conforming to this statute than if it were not a charter city. In the case of State vs. Carey, 136 S.W. 2d 324, at l.c. 325, the Missouri Supreme Court stated:

"Respondent also contends that Sec. 92 of the registration act is invalid. He argues that it conflicts with the city charter, which makes provision for the payment of claims against the city. If so, the provisions of the charter must yield to the constitution and laws of the state. The rule follows: When the ordinances or charter provisions are or become in conflict with prior or subsequent state statutes, such ordinances or charter provisions are or become, void, and must yield to the higher law."

In the case of State vs. Matthews, 274 S.W. 2d 286, at l.c. 292, the Missouri Supreme Court stated:

"Respondents also invoke the provisions of Art. III, § 26, of the Charter and Ordinance No. 46 of the County of St. Louis as authorizing them to designate the type and number

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of machines to be purchased and used. The charter authorizes the Council to establish procedures governing the making of county purchases. The ordinance, enacted pursuant to the charter provision, creates a Division of Purchasing, and provides 'all bids for any * * * purchase may be rejected and new bids advertised for at the discretion of the Supervisor.' The provisions of the charter and ordinances of the county which are in conflict with prior or subsequent state statutes relating to governmental matters must yield. State ex rel. Volker v. Carey, 345 Mo. 811, 136 S.W. 2d 324, 325 [4]; Kansas City v. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S.W. 2d 195, 202, 203 [8,9]." (Emphasis ours.)

CONCLUSION

It is the opinion of this department that paragraphs B-11 and B-12 of Section 1 of Ordinance No. 47605 of the City of St. Louis as amended by Substitute Board Bill No. 472 relating to milk sanitation and the regulation of the production, handling, and sale of milk and milk products, are invalid because of their conflict with Section 196.705, RSMo 1949.

It is the further opinion of this department that a product prepared "by adding hydrogenated vegetable fat, vanilla and gelatin base stabilizer to cream containing 18% milk fat" is a lawful product under the provisions of Section 196.705, RSMo 1949, if it is not in imitation or semblance of milk, cream, or skim milk.

This opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.


Very truly yours,

John M. Dalton
Attorney General

HPW:gm

WATER POLLUTION BOARD: Kansas City, Missouri, and other
CONSTITUTIONAL CHARTER CITIES: constitutional charter cities of
SEWAGE DISPOSAL SYSTEMS: the State of Missouri, are required
to obtain a permit for the construction of sanitary sewers, by virtue of Chapter 204, RSMo, Cum. Supp. 1957, when the disposal of sewage, industrial wastes or other wastes constitute pollution as defined in this chapter; that those constitutional charter cities are required to submit plans and specifications for proposed additions to their sewage collection system when the discharge of sewage constitutes pollution as defined in this chapter.

October 17, 1958


H. M. Hardwicke, M.D.
Acting Director Division of Health
State Office Building
Jefferson City, Missouri

Dear Dr. Hardwicke:

This is in response to your letter of August 18, 1958, in which you request an opinion from this office. We quote:

"In reference to the Water Pollution Law, Chapter 204, Cumulative Supplement, 1957, Revised Statutes of Missouri, 1949, the question has arisen as to whether or not Kansas City, Missouri, is required to submit plans and specifications for proposed additions to the sewage collection system. We are enclosing herewith a copy of a letter from Mr. Reed McKinley, Director of Public Works, Kansas City, in reference to the matter.

"It is respectfully requested that you furnish us with an opinion in this matter at your earliest convenience. In the event Kansas City, Missouri, is not required to obtain a permit for construction of sanitary sewers, we respectfully request an opinion as to whether or not other chartered cities in Missouri are required to obtain a permit for the construction of sanitary sewers."

It is the opinion of this office that Kansas City, Missouri, and other constitutional charter cities of the State of Missouri, are required to obtain a permit for the construction of sanitary sewers, by virtue of Chapter 204, RSMo, Cum.

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Supp. 1957, when the disposal of sewage, industrial wastes or other wastes constitute pollution as defined in this chapter; that those constitutional charter cities are required to submit plans and specifications for proposed additions to their sewage collection system when the discharge of sewage constitutes pollution as defined in this chapter.

Since this office submitted an opinion in June, 1956, the State Legislature has enacted Chapter 204 of the Revised Statutes of Missouri, Cumulative Supplement 1957, which pertains to water pollution in the State of Missouri. We wish to call your attention to a few sections of this Chapter which give an idea of the policy expressed therein. We quote Section 204.010, subsection (5):

"(5) 'Pollution', the discharge or deposit of sewage, industrial waste or other wastes into the waters of the state in such condition, manner or quantity which causes the waters to be contaminated, unclean, impure, odorous or noxious to such an extent as to be detrimental to public health, to create a public nuisance, to kill or have an unreasonably harmful effect upon fish or other aquatic life, or upon game or other wildlife, or unreasonably detrimental to agriculture, industrial, recreational or other reasonable uses."

We also quote Section 204.020 and Section 204.030, paragraphs 1, 2 and 3:

"204.020. Policy declared.--Inasmuch as the people of the state of Missouri are dependent upon the rivers, streams, lakes and subsurface waters of the state for public and private water supply and for agricultural, industrial and recreational uses, it is declared to be the policy of the state of Missouri to act in the public interest to restore and maintain a reasonable degree of purity in the waters of the state, and to require, where necessary, reasonable treatment of sewage, industrial wastes and other wastes prior to their discharge into the waters of the state."

"204.030. Water pollution unlawful--sewage and waste discharges into waters regulated--

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permits required--revocation, notice.--1. It is unlawful for any person to cause pollution as defined in section 204.010. Any such action is hereby declared to be a public nuisance.

"2. No person, without first securing from the board a permit, shall construct, install or modify any system for disposal of sewage, industrial wastes, or other wastes or any extension or addition thereto when the disposal of the sewage, industrial wastes or other wastes constitutes pollution as defined in this chapter; increase the volume or strength of any sewage, industrial wastes or other wastes in excess of permissive discharges specified under any existing permit; or construct or use any new outlet for the discharge of any sewage, industrial wastes or other wastes into the waters of the state which constitutes pollution as defined in this chapter."

"3. Any person desiring to erect or modify facilities or commence or alter an operation of any type which will result in the discharge of sewage, industrial wastes or other wastes into the waters of the state shall apply to the board for a permit to make a discharge which constitutes pollution as defined in this chapter. The board, under the conditions it prescribes, may require the submission of such plans, specifications and other information as it deems relevant in connection with the issuance of the permits. The board shall determine whether or not the discharge will cause a condition of pollution contrary to the public interest. The board may issue a permit which authorizes the person to make the discharge, and may specify on the permit the conditions under which the discharge shall be made. The board may revoke or modify any permit if the holder of the permit is found to be in violation of subsection 2, or if the holder of the permit fails to operate an existing facility as specified in the approved plan. No permit may be revoked or modified without first giving thirty days' written notice to the holder of the permit of intent to revoke or modify the permit."

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You will observe that it is the purpose of this enactment to enable the State of Missouri to regulate and control the discharge of impure, odorous and noxious materials into the State's water supply and streams in the prevention of contamination and diseases which would be a detriment to the public health of the State in general. It would appear upon reading Chapter 204 that the law applies to all persons, including bodies politic and corporate, and to partnerships and other unincorporated associations, and that there would be no exception. We submit that constitutional charter cities are "bodies politic".

We wish to direct your attention now to an opinion by this office of June 14, 1956, a copy of which is enclosed. On reading this you will find that it sets forth the law with respect to the force and effect of laws enacted by constitutional charter cities, such as Kansas City. Briefly, the law has been construed to mean that where the provisions of a constitutional charter of a city chartered under Section 19, Article VI of the 1945 Constitution of Missouri, and the general statutes of Missouri are in conflict as to a municipal function, the constitutional charter controls or supersedes the general law. Although you may also observe from this former opinion that it has been determined by the courts of Missouri that the construction of a system of sewers and sewage treatment facilities for the municipality is a municipal function, it is now our belief that Chapter 204 establishes an overriding and general policy of the state for the purpose of preventing water pollution. It is that pollution with which the state has a concern, that it may prevent disease, infection, and the loss of our river life. The Supreme Court of Missouri en banc, in September, 1955, in the case of State v. Kemp, 283 S.W. 2d 502, 1.c. 515, states:

"Each of them recognizes and holds inviolable the rule that the charter of a city (organized as in Kansas City) is subordinate to the will of the General Assembly insofar as it relates to governmental policy as distinguished from matters of local municipal concern."

We believe that the construction of sanitary sewers is no longer a matter of sole local concern to constitutional charter cities in the State of Missouri, that they are a part of a system for the disposal of sewage, and that their construction is a matter of general state concern.

H. M. Hardwicke, M.D.

Having established the applicability of Chapter 204 to constitutional charter cities, such as Kansas City, we wish merely to emphasize the fact that it is when pollution exists, or will exist, the existence of which is to be determined by the Water Pollution Board, that a permit for construction, installation or modification of a system for the disposal of sewage or other wastes is required. If a system of disposal will not increase the volume or strength of sewage and other wastes in excess of permissive discharges under any existing permit, a new permit would not be required. Therefore, it is when there is a finding that pollution as defined by this chapter will exist that a permit will be required and that the Water Pollution Board may require the submission of such plans, specifications and other information it deems relative in connection with the issuance of the permits. This is as required by Section 204.030, paragraph 3.

CONCLUSION

It is the opinion of this office that Kansas City, Missouri, and other constitutional charter cities of the State of Missouri, are required to obtain a permit for the construction of sanitary sewers, by virtue of Chapter 204, RSMo, Cum. Supp. 1957, when the disposal of sewage, industrial wastes or other wastes constitute pollution as defined in this chapter; that those constitutional charter cities are required to submit plans and specifications for proposed additions to their sewage collection system when the discharge of sewage constitutes pollution as defined in this chapter.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Very truly yours,

JOHN M. DALTON
Attorney General

JBS:mc

WATER POLLUTION BOARD:
FEDERAL JURISDICTION:
STATE HOSPITALS:

1. Since the purpose expressed by the enactment of Chapter 204 of the Revised Statutes of Missouri, Cum. Supp. 1957, is effected by Section 466h of Title 33, United States Code Annotated, there has

not arisen a situation which would necessitate the requirement by the State of Missouri that facilities of a specific type be constructed or maintained by Federal agencies and installations in the State of Missouri, nor that they be required to obtain a permit to discharge waste into the waters in Missouri. 2. Missouri state installations such as the state hospitals at Farmington and Nevada are subject to Chapter 204, RSMo, Cum. Supp. 1957, and are required to obtain construction permits for sewage disposals and to discharge wastes into the waters of the state.

Dr. H. M. Hardwicke
Acting Director
Division of Health
State Office Building
Jefferson City, Missouri



Dear Dr. Hardwicke:

This is in response to your letter of September 3, 1958, and our telephone conversation with Mr. Jack Smith of your department on the 29th of October, in which you request an opinion from this office. We quote:

"It is respectfully requested that you advise us as to whether or not federal installations such as Whiteman Air Force Base and Fort Leonard Wood are required to obtain a construction permit for proposed sewage treatment works, and whether or not they are required to obtain a permit to discharge waste into the waters of the state. As we understand Chapter 204, Revised Statutes of Missouri, 1949, Cumulative Supplement, 1957, there are no exceptions in regard to obtaining permits for construction of sewage treatment works or for discharge of waste into the waters of the state.

"We also request an opinion as to whether or not state installations such as the State Hospitals at Farmington and Nevada are required to obtain construction permits for sewage treatment works and permits to discharge waste into the waters of the state.

Dr. H. M. Hardwicke

"We would appreciate receiving your opinion at an early date since the Water Pollution Board is now carrying out the provisions of Chapter 204, Revised Statutes of Missouri, 1949, Cumulative Supplement, 1957."

For the purpose of indicating the policy of Chapter 204 of the Revised Statutes of Missouri, Cumulative Supplement 1957, we quote Section 204.020:

"Inasmuch as the people of the state of Missouri are dependent upon the rivers, streams, lakes and subsurface waters of the state for public and private water supply and for agricultural, industrial and recreational uses, it is declared to be the policy of the state of Missouri to act in the public interest to restore and maintain a reasonable degree of purity in the waters of the state, and to require, where necessary, reasonable treatment of sewage, industrial wastes and other wastes prior to their discharge into the waters of the state."

We also quote Section 204.030, Paragraph 1:

"It is unlawful for any person to cause pollution as defined in section 204.010. Any such action is hereby declared to be a public nuisance."

With respect to your first question, we wish to direct your attention to Section 466h of Title 33, United States Code Annotated, entitled, "Cooperation to control pollution from Federal installations" which states:

"It is declared to be the intent of the Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, insofar as practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare, and with any State or interstate agency or municipality having jurisdiction over waters into which any matter

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is discharged from such property, in preventing or controlling the pollution of such waters."

It is our understanding that the Federal agencies and installations within the State of Missouri have been directed to cooperate, and have been so doing, with the State of Missouri in preventing and controlling pollution, by virtue of Section 466h. It is our understanding that the Federal installations are to accept Missouri's standards with respect to the permissible effluent discharged into the waters in Missouri. Bearing in mind that this is the result desired by the enactment of Chapter 204 RSMo, Cumulative Supplement 1957, it is our belief that a situation has not arisen which would necessitate the requirement by the State of Missouri that facilities of a specific type be constructed or maintained by the Federal installations. As this office pointed out in an opinion submitted to you on October 17, 1958, it is only when pollution, as defined by Chapter 204, exists, or will exist, that the State of Missouri may require the submission of plans and the permit. Therefore, inasmuch as the cooperative directive is in effect, we believe that there is no conflict between the Federal authority and the state authority.

With respect to your second question, it is our opinion that Chapter 204, RSMo, Cum. Supp. 1957, is applicable to Missouri installations such as the state hospitals at Farmington and Nevada, and that they are required to obtain construction permits for sewage disposals and to discharge wastes into the waters of the state. We wish to state the general policy as it is set forth in 82 C.J.S., page 557:

"Particular words and phrases. In general, the word 'person' used in a statute will not be construed so as to include the sovereign, whether the United States, or a state, or an agency thereof, or a city or town. However, it may include the sovereign where the legislative intent to do so is manifest; and whether the word 'person' as used in a statute includes a state or the United States depends on its legislative environment, that is, the context or the connection in which the word is found; and aids in determining such question include

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the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute. The same rule applies to the word 'corporation' so that whether a state or the United States is included therein depends on its legislative environment. Generally the word 'corporations' as used in statutes is construed to refer to private corporations and not to include municipal corporations, unless the statute clearly indicates an intention to the contrary. Various other words or phrases have been construed as not ordinarily including the government, such as the term 'landlord' or 'employer'."

We also wish to quote Section 204.010, paragraph 4, which defines "person" as used within this chapter:

"(4) 'Person', may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations."

You will note that the word "person" may extend and be applied to "bodies politic and corporate". We wish to set forth the definition of the term "body politic" as given in Webster's New International Dictionary, Second Edition, Unabridged:

"Body politic. A group organized for government; now usually specif.: A state."

In *United States v. Maurice*, 26 Fed. Cas. 1211, Chief Justice Marshall says at page 1216:

"The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers, for important purposes."

You will observe from this definition, and the quotation

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of Chief Justice Marshall, that a body politic may be construed to be a state, a governing system which may attain the objects for which it was created. We think that this definition includes the agencies or institutions of the state, and that they would be considered a part of that body politic. Agencies and institutions of the state would be the "means which are necessary for their attainment."

We would also be remiss in not taking into consideration the policy of the State of Missouri as expressed in Chapter 204, the water pollution act. It is obvious that it would be beneficial to the people of the State of Missouri to have the state's rivers and streams and waters in a pure and unpolluted condition. We need not elaborate to suggest that it is in the interest of prevention of disease and unsanitary conditions to maintain this water pollution policy. We believe that the General Assembly would intend that its own state agencies would be subject to this water pollution act when those agencies themselves are as capable of polluting the waters of the state as would be many a city industry. The subject matter of this enactment is of state-wide concern, and the enactment is not a usurpation of state jurisdiction, but merely an extension of that state's jurisdiction to its own institutions and agencies. Since the purpose of Chapter 204 is for the public good we cannot but believe that it was the intention of the Legislature that all persons in the State of Missouri, including bodies politic and corporate, and to partnerships and other unincorporated associations, be subject to this water pollution act.

CONCLUSION

It is the opinion of this office that:

1. Since the purpose expressed by the enactment of Chapter 204 of the Revised Statutes of Missouri, Cum. Supp. 1957, is effected by Section 466h of Title 33, United States Code Annotated, there has not arisen a situation which would necessitate the requirement by the State of Missouri that facilities of a specific type be constructed or maintained by Federal agencies and installations in the State of Missouri, nor that they be required to obtain a permit to discharge waste into the waters in Missouri.

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2. Missouri state installations, such as the state hospitals at Farmington and Nevada, are subject to Chapter 204, RSMo, Cum. Supp. 1957, and are required to obtain permits for the construction of sewage disposal systems and to discharge wastes into the waters of the state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc

LS: Change of boundary lines may be voted on only at annual school election; no limit as to number of times such petitions may be presented and voted upon.



March 21, 1958

Honorable Eugene S. Heitman
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Heitman:

This is in response to your request for opinion of recent date, which reads as follows:

"About one year ago, one of the original rural school districts which is now a part of The Lutesville Consolidated School District, which original district adjoins Cape Girardeau County, Missouri, tried to withdraw from the Consolidated School in this county and become a part of the Jackson Consolidated District in Cape Girardeau Co. Mo. Cape County district voted to accept them and Bollinger County Consolidated voted no, and this matter was then submitted to arbitration as provided by law and the Board of Arbitrators decided against permitting them to go to Cape County, but determined that they should be and remain a part of the Lutesville Consolidated District.

"It is now rumored that they may again attempt to submit it to another vote and again have it referred to a Board of Arbitrators. Do they have a right to do this, or are they obliged to remain in the Bollinger County, Lutesville Consolidated District? And if they can have it submitted again, how many more times can they have this matter voted on and arbitrated."

Honorable Eugene S. Heitman

Change of boundary lines between six-director school districts is governed by Section 165.294, RSMo, Cum. Supp. 1957, which is too lengthy to set out here in full. This statute provides the steps which must be taken in order to effect such a change in boundaries, and, among other things, states that:

"The secretaries of the district boards of education shall post a notice of the desired change in at least five public places in each district affected at least fifteen days prior to the next annual school election, or publish notice for the same length of time in all the newspapers of the districts."

Since there is no provision for holding a special election on this issue, it can be presented only at the annual school election. Subject to this restriction, there is no limit as to the number of times a petition for change of boundary lines may be presented and voted upon.

In this respect, Section 165.294, supra, change of boundary lines, differs from Section 165.300, RSMo, Cum. Supp. 1957, annexation, in that in the latter it is provided that the election for annexation shall be held at a special meeting or election, but that after the holding of such special election no other such special election shall be called within a period of two years thereafter.

CONCLUSION

It is therefore the opinion of this office that petitions for changes of boundary lines between two six-director school districts may be presented and voted upon only at the annual school election, but that subject to this restriction there is no limitation as to the number of times that a petition for change of boundary lines may be presented and voted upon.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

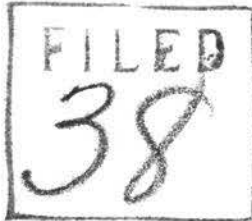
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

CONSTITUTIONAL LAW:
GENERAL ASSEMBLY:

Under the provision of Section 20(a) of Article III, Constitution of Missouri, the second extraordinary session of the General Assembly would be automatically adjourned sine die on midnight, Friday, April 4, 1958, unless it had adjourned sine die prior thereto.



April 1, 1958

Honorable Warren E. Hearnnes
Representative, Mississippi County
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads:

"Section 20A of Article 3 of the Constitution of Missouri states that the General Assembly shall automatically stand adjourned sine die at midnight on the 60th calendar day after the date of its convening in special session, unless it has adjourned sine die prior thereto.

"In determining the proper date for the present special session to adjourn, does this mean that the Second Extraordinary Session which convened on February 3, 1958, must adjourn sine die at midnight on April 3, 1958, or April 4, 1958? It is necessary that we determine this as soon as possible so that we can plan on the necessary closing arrangements."

Section 20a of Article III of the Missouri Constitution more fully provides as follows:

"The General Assembly shall automatically stand adjourned sine die at midnight on the sixtieth calendar day after the date of its convening in special session unless it has adjourned sine die prior thereto."

The precise question presented by your request has not been passed upon by the appellate courts of this state, however, a literal reading of the above constitutional provision would lead

Honorable Warren E. Hearnes

to the conclusion that the date of the General Assembly's convening in special session would be excluded in computing the sixtieth day, or the date when the General Assembly would automatically stand adjourned sine die, unless it has adjourned sine die prior thereto. This, for the reason that the language chosen by the framers of the Constitution says the sixtieth calendar day "after" the date of the Assembly's convening in special session.

We invite attention to Section 1.040, RSMo 1949, which provides as follows:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

This statutory exposition of the common law (so denominated in the case of Hahn v. Dierks, 37 Mo. 574) has been applied in the computation of time under constitutional provision by the Supreme Court of Missouri. See Beaudean vs. City of Cape Girardeau, 71 Mo. 392.

The question presented in the latter case was as to whether or not the Governor had vetoed a bill within the time limited by Section 9 of Article V of the 1865 Constitution. That constitutional provision read, in part:

"If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall become a law in like manner as if the Governor had signed it. * * *"

In construing this provision, the court stated at l.c. 397:

" * * * The bill was presented to the governor on the 5th day of February, 1875, and was returned with his veto on the 17th day of February. Not counting the two Sundays which intervened between these periods, they being expressly excepted by the constitution from being counted, and applying the rule of excluding the first and including the last day, as laid down in the cases of Reynolds v. M.K. & T. R.R. Co. 64 Mo. 70, and Hahn v. Dierks,

Honorable Warren E. Hearnes

37 Mo. 574, the veto of the governor was returned within the time required by the constitution, * * *."

With reference to the word "after" the rule as to the computation of time is stated in 52 Am. Jur., page 352, Section 27, as follows:

"The word 'after' has been given a variety of meanings and applications by the courts, although generally, time 'after' an act is computed by excluding the day on which the event took place. So also, the words 'from and after' ordinarily signify the exclusion of the day from which the reckoning is to be made, except where this construction defeats the purpose of the contract or statute."

The rule is stated in 86 C.J.S., page 851, Section 13 (3) as follows:

"Since the words 'from' and 'after' are generally considered to exclude the terminus a quo, and are usually regarded as terms of exclusion, it is the generally accepted rule that in computing a period of time 'from' or 'after' a certain day or a given date, or from the day of a specified act, the day or date from which the reckoning is made will be excluded and the last day of the period will be included, and in this connection there is at present no distinction in meaning between 'date' and 'day of the date.' * * *"

As to cases from other jurisdictions holding that where a time is to be computed "after" a certain date, the first date should be excluded. See *Lewis vs. Cozine*, 29 S.W.2d 34; *State v. Sessions*, 84 Kan. 856, 115 P. 641; *Holt v. Richardson*, 134 Ga. 287, 67 S.W. 798; *DeForest Lumber Co. vs. Potter*, 251 N.W. 442, 213 Wis. 288.

In view of the foregoing authorities, and in view of the language of the constitutional provision under consideration, it is our opinion that in computing the date on which the Legislature must adjourn sine die the first day of the session, that is February 3, 1958, should be excluded. The sixtieth day thereafter would be Friday, April 4, 1958, and the Legislature would be

Honorable Warren E. Hearnes

automatically adjourned sine die on midnight of that date, unless it had adjourned sine die prior thereto.

CONCLUSION

Therefore, it is the opinion of this office that under the provision of Section 20(a) of Article III, of the Constitution of Missouri, the second extraordinary session of the General Assembly would be automatically adjourned sine die on midnight, Friday, April 4, 1958, unless it had adjourned sine die prior thereto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:mw:hw

PERMITS: County courts of fourth class county may not issue permits for purpose of taxation for all new buildings constructed in the county. It is the licensed manufacturer, within \$150.300 to 150.320, RSMo 1949, against whom the personal property taxes applicable are assessed.

TAXATION:



April 16, 1958

Honorable Eugene S. Heitman
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Heitman:

This will acknowledge receipt of your opinion request of March 21, 1958, which reads as follows:

"We would like your opinion on two questions here in Bollinger County.

"(1) The Deevers Shoe Factory, of Lutesville, Missouri, operates machinery belonging to United Shoe Machinery Company. Should personal property tax on this shoe machinery be paid by Deevers Shoe Factory or by United Shoe Machinery Company?

"(2) Does the Bollinger County Court have authority to issue building permits for the purpose of taxation, for all new buildings constructed in the County?

"I will appreciate your opinion on these questions at your early convenience."

It is our understanding from the telephone conversation with you on the 31st of March that you wish us to interpret your first question to be as against whom the personal property tax on this shoe machinery should be assessed rather than to determine which of the two involved companies should be responsible for the payment of the property tax. The payment of the tax could be governed by stipulations of the lease or contract, of which there was no submission to this office. To clarify the question to which we direct this opinion, we shall place it in this form:

Honorable Eugene S. Heitman

(1) The Deevers Shoe Factory of Lutesville, Missouri, a manufacturing corporation, operates machinery belonging to United Shoe Machinery Company. Should personal property tax on this shoe machinery be assessed against the Deevers Shoe Factory or against the United Shoe Machinery Company?

It is our belief that the answer to your problem is suggested by Chapter 150 of the Revised Statutes of Missouri, 1949. We direct your attention first to Sections 150.300 and 150.310(1), RSMo 1949, which state:

"150.300--Every person, company or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials, shall be held to be a manufacturer for the purposes of sections 150.300 to 150.370."

"150.310.--1. Every manufacturer in this state shall be licensed and taxed on all raw material and finished products, as well as all the tools, machinery and appliances used by them, in the same manner as provided by law for the taxing and licensing of merchants; and no county, city, town, township, or municipal authority thereof, shall ever levy any greater amount of tax against a manufacturer than is levied against merchants for the same period." (Underscoring ours.)

And we also call your attention to Section 150.320, which reads:

"1. On the first Monday in May in each year, every manufacturer shall furnish to the assessor of the licensing county or township a statement of the greatest amount of raw material and finished products, as well as all the tools, machinery and appliances used by him, which he may have had on hand at any time between the first Monday in January and the first Monday in April next preceding. The statement shall include raw materials and finished products owned by such manufacturer, as well as all the tools, machinery and appliances used by him.

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"2. The county assessor shall enter such statements in a book to be prepared for that purpose at the expense of the county, suitably ruled, with columns for the name of the manufacturer, the amount of his statement as returned to the assessor, the valuation of such statement as equalized by the county board of equalization, and for state, county, and school taxes, and such other columns as may be found useful or convenient in practice. The assessor shall verify the tax book by an affidavit annexed thereto in the following words:
* * *."

It is to be observed from the above statutes that manufacturing corporations are to be taxed in the same manner as provided by law for the taxing and licensing of merchants. And for the purpose of assessment of the tax every manufacturer shall furnish to the assessor of the licensing county, or township, a statement of the greatest amount of the tools, machinery and appliances used by him. We believe that it was the intention of the Legislature that the statement furnished by the manufacturer to the assessor should serve as the basis for the assessment of the taxes against such property. We also believe that it was the intention of the Legislature that the taxes should be assessed against the manufacturing corporation which is licensed in accordance with the statutes and which was required to submit the statement for the purpose of the assessment.

It is our opinion that it could not have been intended that there exists an unlimited discretion in the assessor in determining against which entity or person the taxes should be assessed. It is the product of reason and logical inference that brings us to the conclusion that it is the licensed manufacturer, within Sections 150.300 to 150.320, RSMo 1949, against whom the personal taxes applicable are assessed.

From the 1957-58 Roster of State, District and County Officers of the State of Missouri, compiled by the Missouri Secretary of State, we find that the county of Bollinger is a county of the fourth class.

Upon a study of the sections of the Revised Statutes of 1949, applicable to counties of the fourth class, and county courts generally, we can find no express authority for a fourth

Honorable Eugene S. Heitman

class county court to issue building permits for the purpose of taxation for all new buildings constructed in the county. Nor do we observe any authority from which it may be implied that a fourth class county court has authority to issue building permits for the purpose of taxation for all new buildings constructed in the county.

We direct your attention to the case of King vs. Maries County, 249 S.W. 418, 1.c. 420, where the court stated:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute * * *. This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. * * *"

In State ex rel. Moser vs. Montgomery, 186 S.W. 2d. 553, it is stated:

"The county courts are courts of limited jurisdiction without common-law jurisdiction and, aside from the management of the fiscal affairs of the county, possess no powers except those conferred by statute."

CONCLUSION

It is the opinion of this office that personal property tax to be assessed against the manufacturing shoe machinery operated by the Deevers Shoe Factory of Lutesville, Missouri, should be assessed against the Deevers Shoe Factory.

We are also of the opinion that consistent with the above citations, and the statutes of Missouri, there is neither express nor implied authority for the Bollinger County Court to issue building permits for the purpose of taxation for all new buildings constructed in the county.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mw;ml

INHERITANCE TAXES:
ANNUITY PROCEEDS:
TAXABLE: WHEN:



When decedent paid annual fixed premium for life, under terms of annuity contract; was not to receive any return of premiums or income thereon during her life; had right to change beneficiaries but did not, and on her death premiums paid company or cash value, whichever was greater, to be paid named beneficiaries, and beneficiaries to come into possession and enjoyment of fund at or after decedent's death. Said transfer is taxable under provisions of par. 3, Sec. 145.020, RSMo Cum. Supp. 1957.

June 5, 1958

Honorable Forrest L. Hill
Assistant Supervisor
Inheritance Tax Unit
Department of Revenue
Jefferson City, Missouri

Dear Mr. Hill:

This department is in receipt of your request for our official opinion, reading as follows:

"Your opinion on the following is respectfully requested:

"The issue is whether or not proceeds of a certain annuity are subject to Inheritance Tax. The decedent paid an annual premium of a fixed amount until death; there were no changes under the original contract and no funds were payable to the decedent during her lifetime; the right to change the beneficiary was retained during the entire lifetime of the contract; the premiums were due and payable and the insured could not have obtained a refund of the premiums and the contract provided that upon her death the return of the premiums would be payable or the cash value, whichever was largest; the proceeds are now payable to the beneficiaries named by the decedent."

Section 145.020, RSMo Cum. Supp. 1957, imposes inheritance taxes upon the transfer of any property, or any interest therein, in the cases mentioned in said section, which reads in part as follows:

"1. A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to persons, institutions, associations or corpora-

tions, not herein exempted, in the following cases:

* * * * *

"(3) When the transfer is made by a resident or by a nonresident whose property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every such transfer made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be considered to have been made in contemplation of death within the meaning of this section;

* * * * *

"2. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein or income therefrom."

In this connection, we call attention to the case of Kansas City Life Insurance Co. v. Rainey, 353 Mo. 477, 182 SW(2d) 624, which we believe to be very much in point. From the facts of such case it appears Herbert F. Hall, aged 72, purchased an "Investment Policy" from the Kansas City Life Insurance Company for \$50,000, with income payable to him, and at his death the principal payable to his wife. After the death of his wife in 1941, Hall named his secretary, Jessie A. Rainey, as the beneficiary in such policy. After the death of his wife, Hall also changed the beneficiary in a similar policy of \$50,000 to Irving V. Sanford, one of his employees.

After the death of Hall, Miss Rainey and Sanford claimed the proceeds of the respective policies from the insurance company. The executor of Hall's estate also claimed the proceeds of both policies. The two suits were tried together in the lower court and when the court found for the beneficiary in each policy, the executor appealed. The two suits were consolidated in the Supreme Court for argument and decision. The policies were the same, and in discussing the issues, the appellate court referred only to the policy for Miss Rainey. It was argued by the executor that the policy was not one of insurance, since there was lacking the necessary element of risk and at Hall's death the insurance company was required to pay \$50,000, and the policy was merely a certificate of deposit to take effect at Hall's death and was

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testamentary in character. In discussing appellant's contention, and other issues involved in the case, the court said at l.c. 483:

"The policy we are considering is a contract between Hall and the insurance company for the benefit of Miss Rainey. This is true regardless of the element of risk. It still would be a contract for the benefit of a third person if made with a bank, a corporation of any other sort, or an individual. In the policy Miss Rainey is a third-party donee-beneficiary. Restatement of Contracts, sec. 133. She is entitled to enforce the contract even though she is a stranger to both the contract and to the consideration. 12 Am. Jur. Contracts, sec. 277.

"The policy is not testamentary because it became effective before Hall's death. It was a contract made and in force during Hall's lifetime. Hence there would be no reason to surround it with formalities which safeguard a will. See Krell v. Codman (Mass.), 14 L.R.A. 860.

"The policy became effective upon its execution and the payment of the consideration of \$50,000, all done during Hall's lifetime. The payment of the consideration was an immediate disposition of the \$50,000. The money became the property of the insurance company. Upon Hall's death the money to be paid to the beneficiary constituted no part of the Hall's estate. So far as Miss Rainey is concerned, any disposition as to her was effected at the time she was designated as beneficiary. Her enjoyment of the fund was merely postponed until Hall's death, subject to the right of revocation retained by Hall.

"The mere fact a note, bond or other instrument for the payment of money is not payable until at or after death is not sufficient to make such an instrument testamentary in character and invalid for that reason. Green v. Whaley, 271 Mo. 636, 197 S.W. 355 (supra); 12 Am. Jur. Contracts, sec. 302; cases cited in Annotation 2 A.L.R. 1471. See Maze v. Baird, 89 Mo. App. 348; Robbins v. Robbins, 175 Mo. App. 609, 158 S.W. 400." (Underscoring ours.)

In this case it will be noted the court held that the annuity contract was one between Hall and the insurance company for the benefit of Miss Rainey, who was a third party donee-beneficiary, and

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since it was not testamentary in character, there was no reason to surround it with the formalities safeguarding a will. The policy became effective upon its execution and payment of the premium, all done during Hall's lifetime, and the money paid for the premium became the property of the insurance company, but at Hall's death was to be paid to Miss Rainey and constituted no part of Hall's estate.

No question of liability or nonliability under the inheritance tax statutes of the gift to Miss Rainey was in issue. While the court found that the fund was no part of the estate, this is no authority for holding that transfers of property, no part of a decedent's estate, are not subject to the tax, as there are many taxable transfers under the statutes where the property was never a part of decedent's estate.

It is noted the court did find the enjoyment of the fund transferred to Miss Rainey was postponed until Hall's death, subject to his right of revocation (or change of beneficiary), which right was never exercised. In other words, the donee beneficiary of the proceeds of the annuity contract was to come into possession and enjoyment of her gift only when the death of Hall occurred.

Section 571, RSMo 1939, of the Inheritance Tax Laws, was in force at the time of Hall's death, and said section, with a few minor changes, has been incorporated in our present statutes. That part of Section 571, imposing a tax on transfers " * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death * * *" has been incorporated in par. 3, sec. 145.020, supra, without any change. Since the gift to Miss Rainey was intended by the donor to take effect in possession and enjoyment when said donor's death occurred, it is believed the transfer would have been a taxable one under provisions of Section 571, RSMo 1939.

In the instant case, we find the factual situation to be very similar to that in the Hall case. The insured paid a fixed annual premium for the annuity contract during her lifetime. She had the right to change beneficiaries but could not withdraw premiums paid or any increase on same. On her death the return of the premiums, or the cash surrender value, whichever was greater, were to be paid to named beneficiaries. Here, as in the Hall case, the beneficiaries were not to come into possession and enjoyment of the proceeds of the contract until the death of the insured occurred. Clearly, this is a taxable transfer within the meaning of par. 3, sec. 145.020, supra, imposing a tax on all transfers of property by deed, grant, bargain, sale or gift, which were intended by the grantor, vendor, or donor to

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take effect in possession or enjoyment at or after such death. Therefore, our answer to your inquiry is in the affirmative.

CONCLUSION

Therefore, it is the opinion of this department that when, under the terms of an annuity contract, the decedent paid an annual premium of a fixed amount for life, and was not to receive any premiums paid or income thereon during her life, with the right to change beneficiaries, but failed to exercise such right, and on decedent's death premiums paid to the company, or the cash value of same, whichever was greater, were to be paid to beneficiaries named in the contract, and the beneficiaries were not to come into possession and enjoyment of the fund until at or after decedent's death; such transfer of the fund is a taxable one under provisions of par. 3, Section 145.020, RSMo Cum. Supp. 1957, of the Inheritance Tax Laws.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

TAXATION:
PUBLIC UTILITIES:
STATE TAX COMMISSION:

The State Tax Commission has the power of original assessment only over public utilities; whether an incorporated mutual telephone company is a public utility, in whole or in part, is a question of fact to be determined by reference to the actual operation of the company.



May 20, 1958

Honorable Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Mr. Hoff:

Reference is made to your request for an official opinion, which request reads as follows:

"I have a question I wish to propound and perhaps you have already rendered an opinion covering the situation, but if not, I would like to have your official opinion as to whether the State Tax Commission has the power of original assessment over the Stockton Mutual Telephone Company on the basis of the following facts:

The Stockton Mutual Telephone Company was organized and incorporated in 1949 following an ice storm which demolished the old mutual system. Nineteen businessmen and farmers were the original incorporators. The company was organized as a mutual telephone company and was not intended to operate for profit and no profit has been received by the incorporators. Being a mutual telephone company, it has not been regulated by the Public Service Commission and has not been recognized as a public utility.

The Bell Telephone Company, by order of the Public Service Commission, did build a toll line to the city limits of Stockton where it was attached to the cables of the local company.

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For the past several years, the telephone company has filed its reports to the State Tax Commission and was assessed by the commission. The State Tax Commission insists that it has jurisdiction to assess the local mutual company, and the clerk, Mr. Towson, gives as its reasons the fact that the Bell long distance line connects with our company lines, making us a public utility to the extent that gives the State Tax Commission jurisdiction.

In view of the holding of the Supreme Court in the case of State ex rel vs. Baker, 9 SW2nd, 589 in which the Court held that the State Tax Commission had the power of original assessment over public utilities only and the case of State ex rel Lohman and Farmers Mutual Telephone Company vs. Brown et al, 19 SW2nd, 1048 in which the Court held that a mutual company might be a public utility as respect to its long distance lines and no further as to its general operation (and in this case the long distance lines are not the property of the mutual telephone company), I am unable to see how the Commission could claim the power of original assessment of this company."

Section 138.420, RSMo 1949, provides that the State Tax Commission shall have the exclusive power of original assessment of telephone companies in the following language:

"1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms."

Section 153.030, RSMo 1949, relating specifically to telephone companies, provides in part as follows:

"1. All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made

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for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons.

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing, and adjusting the taxes on railroad property; * * *

In considering the above-noted statutory provisions, the Supreme Court of Missouri en Banc, in the case of State ex rel. v. Baker, 320 Mo. 1146, 9 SW 2d 589, held that the Legislature only intended to confer upon the State Tax Commission the power of original assessment over "public utilities." The Court stated, 9 SW 2d, 1.c. 593:

"* * * Rather, we hold that by the amendment the Legislature intended to confer upon the tax commission the power of original assessment over only public utilities."

In the case of State ex rel v. Brown, 19 SW 2d 1048, the Supreme Court of Missouri had before it the question as to whether an unincorporated mutual telephone company was a public utility and thereby subject to regulations by the Public Service Commission. In holding that the particular company in question was a public utility in regard to a part of its operation and not a public utility as to the remainder of its operation, the Court stated:

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"* * * whether it is a public utility is to be determined from what it does; * * *"

The Court held that insofar as it operated a telephone exchange for itself (members), it was not a public utility.

The fact that the company apparently did not operate for a profit was not given consideration by the Court in determining whether or not it was a public utility.

In the case of State v. Baker, supra, a power transmission company contended that it was not a public utility because it did not have charter authority to serve the public; did not have a franchise; and had never exercised the power of eminent domain. The Court stated that these factors might be considered in determining if a company is a public utility but stated that the

"* * * absence of charter authority to serve the public is not determinative of the question."

Note the following from the case of State ex rel. v. Public Service Commission, 275 Mo. 483, 493, 205 SW 36, 39:

"In determining whether a corporation is or is not a public utility, the important thing is, not what its charter says it may do, but what it actually does. Terminal Taxicab Co. v. Kutz, 241 U.S. 252 [36 S. Co. 583, 60 L. Ed. 984.]"

We are of the opinion that the fact that the Stockton Mutual Telephone Company is incorporated as a mutual telephone company; the fact that it was not intended to operate at a profit; the fact that the incorporators have received no profit; or the fact that the company has not been regulated by the Public Service Commission are not singularly or together determinative of the question as to whether the company is a public utility, but that such fact can only be determined by reference to the actual operations of the company, what it does. Is its property or any part thereof dedicated to the public use? Is the public invited to use its properties? These are all questions of fact which should be and are deferred to the Missouri State Tax Commission as the proper administrative fact-finding body.

In order to prevent the necessity of further legal opinions, we wish to state that in our opinion the mere fact that a long distance line of another public utility company connects with the line of the

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Stockton Mutual Telephone Company would not make the latter company a public utility if it were not otherwise such. See State ex rel. v. Brown, 19 SW 2d 1048.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the State Tax Commission has the power of original assessment only over public utilities; whether an incorporated mutual telephone company is a public utility, in whole or in part, is a question of fact to be determined by reference to the actual operation of the company.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw/om

COUNTY TREASURER:
FUNDS, SURPLUS:
GENERAL REVENUE:

A balance accumulated in a special fund (County Superintendent of Schools Clerical Fund) maintained by a County Treasurer of a third class county, of funds received from the State of Missouri, under the provisions of Section 167.230 RSMo Cum. Supp. 1957, is to be returned to the State of Missouri at the end of each fiscal year in which such balance has accrued.



August 11, 1958

Hon. Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your letter of July 25, 1958, which we quote as follows:

"Please furnish this Department with an official opinion on questions involved under circumstances as follows:

"A balance of \$6,880.89 has accumulated over a period of years in a special fund (County Superintendent of Schools Clerical Fund) maintained by a County Treasurer of a third class county, of funds received from the State of Missouri, under the provisions of Section 167.230 Cumulative Supplement, R.S.Mo., 1957. No contributions have been made by the County Court to this fund.

"The questions are - What disposition should be made of the accumulated balance?

"(1) Should it be transferred by the County Court as provided in Section 50.020, R.S. Mo., 1949?

"(2) Should it be refunded to the state under any statutory provisions?

"(3) Should it be used for subsequent payments of clerical assistance to the Superintendent of Schools for the State's proportionate part of the annual compensation

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(\$750.00) as provided in Section 167.230 Cumulative Supplement, R.S. Mo. 1957? If so, can the State withhold further payments of \$750.00 per year to the county treasurer, until the accumulated balance has been absorbed?"

It is the opinion of this office that the surplus moneys accumulated in a fund for County Superintendent of Schools Clerical Fund, surplus moneys which have been received from the State of Missouri for the purpose of such Clerical Fund, should be returned to the State of Missouri.

Your attention is directed to Section 167.230 RSMo Cum. Supp. 1957, which we consider to be the controlling statute with respect to this problem. It states:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred and fifty dollars nor more than two thousand dollars annually to be determined and fixed by the county court, seven hundred and fifty dollars of which shall be paid by the state out of state school moneys, the same to be included by the state board of education as a part of the apportionment made before August thirty-first of each year. The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasurer for the payment of same. The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court, draw a warrant each month for payment of same out of moneys provided by the state for such purpose, and the county court shall upon presentation of

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a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent, draw a warrant each month upon the county treasury for that part of the compensation for such purpose in excess of that provided by the state; provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be seven cents per mile for each mile actually and necessarily traveled; provided further, that all warrants in payment for clerical hire shall be drawn in favor of the person or persons who render such services, and in no case shall the county superintendent personally receive any part thereof."

We wish to particularly point out that sentence in Section 167.230 which authorizes the county treasurer to draw a warrant each month for payment of same to the clerical employee out of moneys provided by the state "for such purpose." It is obviously the purpose of this section that the moneys provided by the state are for the express purpose of the payment of the superintendent's clerical employees. An amount is established in excess of which funds provided by the state are not to be used in the payment of such clerical employees. This aids in establishing the point that the county court is not at complete liberty to spend the money of the state in any manner it wishes, and that it was the purpose of the statute that only a specified amount should be paid to the clerks for their duties.

It is conceivable that, although the statute contemplated that there would be hired clerks on an annual basis, there might be a period of time during the fiscal year, or a period of time in excess of a year, in which no person would be acting in the capacity of the superintendent's clerk; and it would be because of this lapse of time in which no such employment existed that a balance or surplus would be created.

We do not believe that it is the prerogative of the county court to dispose of this surplus by virtue of Section 50.020. We believe that this section is inapplicable to the specific fund which has been commenced and perpetuated by the generosity of the state.

Section 50.020, RSMo 1949, states:

"Whenever there is a balance in any county

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treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

You will note the phrase referring to a balance which is no longer needed for the purpose for which it was "raised." We think the term "raised" is very important, that when this section was written it was for the disposition of moneys which had been "raised" by the county. This section does not provide for the disposition of funds which have been provided by the state or federal government.

In reaching our conclusion we attempt to delineate the purpose of the statute. The amount of state funds to be used for the specified purpose is not to be in excess of \$750 annually. This same amount is apportioned annually by the State Board of Education solely for the stated purpose. Therefore, in a year in which the purpose of the statute is not carried out, and in the absence of any other dispositive scheme, the balance should be returned to the State of Missouri.

CONCLUSION

It is the opinion of this office that a balance accumulated in a special fund (County Superintendent of Schools Clerical Fund) maintained by a County Treasurer of a third class county, of funds received from the State of Missouri, under the provisions of Section 167.230, RSMo Cum. Supp. 1957, is to be returned to the State of Missouri at the end of each fiscal year in which such balance has accrued.

Very truly yours,

John M. Dalton
Attorney General

JBS:mjb

STATE AUDITOR:
PUBLIC RECORDS:
PUBLIC INFORMATION:

When an audit of a six-director school district is requested under the provisions of Section 29.230, RSMo 1949, by a petition containing the signatures of five per cent (5%) of the qualified voters, it is not necessary for the Office of State Auditor to furnish a photostatic copy of that petition to the board of education of the school district, or to any other person, even though it may have been requested.

August 22, 1958

Hon. Haskell Holman
State Auditor
Jefferson City, Missouri



Dear Mr. Holman:

This is in response to your letter of August 13, 1958, in which you request from this office an opinion as follows:

"It is requested that you furnish this department with a formal opinion on the following questions:

"1. When an audit of a six-director school district is requested under the provisions of Section 29.230, R.S.Mo., 1949, by a petition containing the signatures of five per cent (5%) of the qualified voters, is it necessary to furnish a photostatic copy of the petition to the board of education if it is requested?

"2. Also, is it necessary to furnish this information to anyone else who desires it?"

It is our opinion that when an audit of a six-director school district is requested under the provisions of Section 29.230, RSMo 1949, by a petition containing the signatures of five per cent (5%) of the qualified voters, it is not necessary for the Office of State Auditor to furnish a photostatic copy of that petition to the board of education of the school district even though it may have been requested. Nor is it required that the State Auditor furnish such copies or take positive action to provide information pertaining to such petition to anyone else who desires it.

We believe that in reaching our conclusion it is unnecessary to determine whether this petition is to be considered a public record. It is commonly known that writings or documents constituting public records are subject to inspection by the public,

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and it is not essential that the inspection of such public records be limited to persons who have some legal interest to be guarded by that inspection. It is within the prerogative of the General Assembly to grant by statute the right of inspection of public records to all persons. We would also observe, with respect to public records, that the right to inspect those records carries with it the right to make copies, without which the right to inspect would be practically valueless. However, this right of inspection has not gone unqualified nor unrestricted, but must be accepted and exercised at a proper time and place, and in such a manner as will not unduly interrupt or interfere with the discharge of official duties. 79 C.J.S., p.288.

Even if this petition were a public record there is no law which requires that the Office of State Auditor photostat and mail out copies of this petition. It is conceivable that the expense of such a requirement as this would be prohibitive in and of itself. We will observe that with respect to public records the right to copy is often present, but, again, this is not the same as the right to the distribution, or receipt, of copies by the office containing the record. There is no Section in Chapter 29 of the Revised Statutes of Missouri 1949, which requires the distribution of photostatic copies of petitions which are submitted under the provisions of Section 29.230. Therefore, whether or not this is a public record, there is no statute requiring dissemination of photostatic copies thereof.

CONCLUSION

When an audit of a six-director school district has been requested under the provisions of Section 29.230, RSMo 1949, by a petition containing the signatures of five per cent (5%) of the qualified voters, it is not necessary for the Office of State Auditor to furnish a photostatic copy of that petition to the board of education of the school district or to any other person even though it may have been requested.

Sincerely yours,

John M. Dalton
Attorney General

JBS/mjb

SCHOOL BOARDS' EMPLOYEES: A person who is not a member of a town school board may serve as secretary to that board and receive the maximum compensation allowed by law and also serve as secretary to the superintendent of schools of such district.



January 7, 1958

Honorable Charles Jack Hoover
Prosecuting Attorney
Grundy County
Trenton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The County Superintendent of Schools of Grundy County has requested that I receive an official opinion, from your office, relative to construction and application of Section 165.360 R.S. Mo., 1949. The specific question he has propounded is, 'May a secretary of a School Board be paid the maximum amount allowed by statute for such services, and, in addition thereto, be compensated for rendering services as Secretary to the Superintendent of Schools?'"

Since writing the above, you have orally informed us that the secretary to the school board of the City of Laredo in Grundy County is not a member of the board. You have further informed us that the employment as secretary to the "Superintendent of Schools" is the superintendent of the schools of the Laredo School District.

You refer us to Section 165.360, RSMo 1949, which reads in part:

"No member of any public school board of a city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services; provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year; * * *"

Honorable Charles Jack Hoover

In view of the fact that the secretary is not a member of the school board, the question is whether there is any incompatibility in the positions of secretary to the school board and secretary to the superintendent of schools. We cannot see that there could possibly be any such incompatibility in view of the fact that both positions are simply secretarial. It is a familiar principle of law in this state that the same individual may hold a limitless number of positions so long as they are not incompatible, that is, that the duties do not conflict, and so long as there is no conflict or statutory prohibition against the holding of such positions by one individual. In the case of Walker v. Bus, 135 Mo. 325 at l.c. 338, the court stated:

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the offices, as where one has some supervision of the other, is required to deal with, control or assist him."

We assume, of course, and it would so appear that the same individual would be able to fully perform the duties of both positions. Being secretary to the school board is, of course, only a part time employment for which the inconsiderable sum of one hundred and fifty dollars per year is paid. We believe, therefore, that the same person may hold both positions simultaneously when such person is not a member of the school board.

CONCLUSION

It is the opinion of this department that a person who is not a member of a town school board may serve as secretary to that board and receive the maximum compensation allowed by law and also serve as secretary to the superintendent of schools of such district.

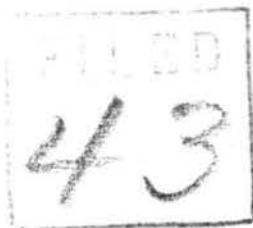
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:db

COURTS: Section 211.321, RSMo 1949 Cum. Supp. 1957
JUVENILE COURTS: is constitutional.
CONSTITUTION:



January 22, 1958

Honorable C. M. Hulen
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Mr. Hulen:

Reference is made to your request for an official opinion of this office as follows:

"Will you please advise me as to your opinion concerning the constitutionality of Section 211.321, Revised Statutes of the State of Missouri, entitled 'Juvenile court records-- records of peace officers as to children-- destruction of records', with particular reference to sub-section one and sub-section two, which read as follows.

"1. The proceedings of the juvenile court shall be entered in a book kept for that purpose and known as the juvenile records. These records as well as all information obtained and social records prepared in the discharge of official duty for the court shall be open to inspection only by order of the court to persons having a legitimate interest therein.

"2. Peace officers' records, if any are kept, of children, shall be kept separate from the records of persons seventeen years of age or over and shall not be open to inspection or their contents disclosed, except by order of the court. This sub-section does not apply to children who are transferred to courts of general jurisdiction as provided by section 211.071."

Honorable C. M. Hulén

Please find enclosed a copy of an opinion to Honorable Hugh H. Waggoner, dated April 8, 1953, to the effect that information compiled under subsection 4, Section 43.120, RSMo 1949, is available to peace officers only.

Please note that on page 2 that opinion quoted from 53 C.J.S., p. 625, in regard to the state's right to grant or withhold the privilege of the inspection of public records.

Since Section 211.321, RSMo 1949, Cum. Supp. 1957, is of such recent origin, there have been no appellate court decisions in regard thereto. There are, however, a great many opinions dealing generally with the constitutional aspects of the juvenile code.

In 1923 the Missouri Supreme Court unanimously decided the case of State v. Buckner, 254 SW 179, in which was said at l.c. 180 as follows:

"The act has another aspect in which it is not affected by this rule. Its principal, if not sole, purpose is not trial and punishment for crime, but the protection and support of neglected children and the reformation of delinquent children. It is well settled that in the cases of delinquent children the state has the power in proper circumstances to take over their custody in order to insure their security, training, and reformation. State ex rel. v. Tincher, supra, and cases cited: In re Sharp, 15 Idaho, 120, 96 Pac. 563, 18 L.R.A. (N.S.) 886, and note, Re Hook, 95 Vt. 497, 115 Atl. 730, 19 A.L.R. 610. The power exerted by the state, parens patriae, is asserted in its right to supply proper custody and care in lieu of that of which neglected and delinquent children are deprived. Farnham v. Pierce, 141 Mass. loc. cit. 205, 6 N.E. 830, 55 Am. Rep. 452; Ex parte Ah Feen, 51 Cal. 280; In re Turner, 94 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022, and cases cited.* * *"

Again, in State ex rel. White v. Swink, 256 SW2d 825, l.c. 831, the St. Louis Court of Appeals made the following reference to Chapter 211, RSMo 1949:

"The Juvenile Court Act, Title 12, Chapter 211 RSMo 1949, V.A.M.S., is a complete law within itself dealing with minors under the age of seventeen years. State ex rel. Shartel v. Trimble, 333 Mo. 888, 63 S.W. 2d 37, loc. cit. 38.* * *"

Honorable C. M. Hulen

It is thought that the rule is, that acts of the Legislature are presumed to be constitutional, as expressed (by our Supreme Court) in the case of City of Springfield v. Smith, 19 SW2d 1, 1.c. 3, wherein it is stated:

"Both upon principle and authority the Acts of the Legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the Constitutionality of the Act.' Hamman v. Cen. Coal & Coke Co., 156 Mo. 232, loc. cit. 242, 56 S.W. 1091, 1093; Miners' Bank v. Clark, 252 Mo. 20, loc. cit. 30, 158 S.W. 597."

CONCLUSION

It is, therefore, the opinion of this office that Section 211.321, RSMo 1949 Cum. Supp. 1957, is constitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Very truly yours,

JOHN M. DALTON
Attorney General

JWF:db

JUVENILE RECORDS:

A person who is not an officer of the court, peace officer, or custodian of juvenile records who communicates information pertaining to juveniles which information he has not obtained directly or indirectly from juvenile court or peace officers' records is not subject to prosecution for violation of Section 211.321, RSMo Cum. Supp. 1957.



June 12, 1958

Honorable C. M. Hulen, Jr.
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

Sometime ago you wrote to this department requesting an official opinion regarding the construction of Section 211.321, RSMo Cum. Supp. 1957.

More recently you have amended this opinion request which now is as follows:

"Is a person who is not an officer of the court, peace officer, or custodian of juvenile records, subject to prosecution under the Juvenile Code for publication or communication of information pertaining to juveniles where such person does not obtain such information directly or indirectly from juvenile court or peace officers' records relating to juveniles."

Numbered paragraphs 1 and 2 of Section 211.321, Missouri Revised Statutes, Cumulative Supplement 1957, read:

"1. The proceedings of the juvenile court shall be entered in a book kept for that purpose and known as the juvenile records. These records as well as all information obtained and social records prepared in the discharge of official duty for the court shall be open to inspection only by order of the court to persons having a legitimate interest therein.

Honorable C. M. Hulen, Jr.

"2. Peace officers' records, if any are kept, of children, shall be kept separate from the records of persons seventeen years of age or over and shall not be open to inspection or their contents disclosed, except by order of the court. This subsection does not apply to children who are transferred to courts of general jurisdiction as provided by section 211.071."

The penalty for the violation of this section is set forth in Section 211.431, which reads:

"Any person seventeen years of age or over who willfully violates, neglects or refuses to obey or perform any lawful order of the court, or who violates any provision of this chapter is guilty of a misdemeanor."

It will be noted from a study of Section 211.321, supra, that the prohibition is against the disclosure of the contents of juvenile records. Your opinion request is in regard to the communication of information pertaining to juveniles where the person communicating such information does not obtain the information from juvenile records and where, it may be assumed, such person may not even know of the existence of such juvenile records.

It would appear to be perfectly plain that Section 211.321 was not designed to apply to a situation such as you set forth. This section obviously is intended to keep from the general public information regarding law violations by juveniles for the protection of juveniles. The law states that the information respecting such juveniles which is collected in a record shall not be disclosed by the custodian of such record except by order of the court. Certainly the first person subject to prosecution for violation of Section 211.321, supra, would be the custodian of the record who disclosed its content without an order of the court so to do. Whether further disclosure to other persons by the person to whom the custodian disclosed the contents of the record would be a violation is a matter which we are not here called upon to decide. As we stated above, it would seem to be perfectly clear that the communication

Honorable C. M. Hulen, Jr.

of information, which information was not secured directly or indirectly from the juvenile records, could not possibly come within the compass of Section 211.321. To hold otherwise would lead to ridiculous results. An individual might have no knowledge whatever that any juvenile record existed; if he communicated information regarding such juvenile, which information was in the record, he would be subject to prosecution, whereas if he communicated information which was not in the record, he would not be subject to prosecution. Also, if he communicated information which was in the record, he would be subject to prosecution; whereas if he communicated exactly the same information but it so happened that there was no juvenile record then he would not be subject to prosecution.

We might also point out that the statement in the statute that the contents of the record could be disclosed only upon an order of the court, clearly could not apply to such an individual as is here under consideration and, therefore, that it could not have been the intention of the law that it should apply to such an individual.

CONCLUSION

It is the opinion of this department that a person who is not an officer of the court, peace officer, or custodian of juvenile records who communicates information pertaining to juveniles which information he has not obtained directly or indirectly from juvenile court or peace officers' records is not subject to prosecution for violation of Section 211.321, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

APPROPRIATIONS:
GENERAL ASSEMBLY:
CONSTITUTION:
LEGISLATURE:

Where the General Assembly makes appropriations in all of the preceding categories, an appropriation in a particular category set forth in Section 36, Article III, Constitution of Missouri, is not unconstitutional because such appropriation is contained in a bill which is finally passed in advance of the final passage of the bill or bills containing the appropriations in the preceding categories.

March 19, 1958

Honorable Richard H. Ichord
State Representative
Texas County
Jefferson City, Missouri

Dear Mr. Ichord:

This refers to your letter of March 12, 1958, requesting an opinion of this office concerning the question whether, in view of Section 36, Article III, Constitution of Missouri, the proposed appropriation for county aid road purposes now contained in House Bill No. 4 will be constitutional if it is enacted as a part of that bill.

Section 36, Article III, Constitution of Missouri, reads as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

"First: For payment of sinking fund and interest on outstanding obligations of the state.

"Second: For the purpose of public education.

"Third: For the payment of the cost of assessing and collecting the revenue.

"Fourth: For the payment of the civil lists.

"Fifth: For the support of eleemosynary and other state institutions.

Honorable Richard H. Ichord

"Sixth: For public health and public welfare.

"Seventh: For all other state purposes.

"Eighth: For the expense of the general assembly."

The proposed appropriation for county aid road purposes comes within the seventh category listed in the foregoing constitutional provision, namely, "For all other state purposes." House Bills Nos. 1 to 6 appear to be designed primarily to make appropriations in the first to sixth categories, respectively, with House Bill No. 4 being the bill designed to make appropriations in the fourth category, namely, "For the payment of the civil lists." However, it may be noted that in the various bills there is considerable intermingling of appropriations in the seventh category with appropriations in other categories, and that this is particularly true of House Bill No. 4.

The number of the bill containing the county aid road appropriation obviously cannot affect the constitutionality of such appropriation. The real question presented is whether the appropriation will be constitutional if it remains in House Bill No. 4 and that bill is finally passed by the General Assembly in advance of final passage of any of the other bills mentioned above. Stated another way, the question is whether an appropriation falling within the seventh category is constitutional if it is enacted as a part of a bill which is passed prior to the passage of the bills containing the appropriations for the preceding six categories.

The above-quoted provisions of the present Constitution were based upon Section 43, Article IV, of the Constitution of Missouri adopted in 1875, which read as follows:

"All revenue collected and moneys received by the State from any source whatsoever, shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

"First: For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.

"Second: For the benefit of the sinking fund, which shall not be less annually than two hundred and fifty thousand dollars.

Honorable Richard H. Ichord

"Third: For free public school purposes.

"Fourth: For the payment of the cost of assessing and collecting the revenue.

"Fifth: For the payment of the civil list.

"Sixth: For the support of the eleemosynary institutions of the State.

"Seventh: For the pay of the General Assembly and such other purposes not herein prohibited, as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated or to give priority in its action to a succeeding over a preceding item as above enumerated." (Under-scoring ours.)

It will be noted that the language underscored in the preceding quotation does not appear in the corresponding provision of the present Constitution.

A review of the debates of the Constitution Convention which drafted the 1875 Constitution, in which a provision of this kind first appeared, indicates that the purpose of the provision was to make sure that money was appropriated for the purposes specifically mentioned, and particularly to require appropriations for the payment of outstanding obligations of the state, so as to protect the credit of the state.

There was little discussion of this provision in the debates of the Constitutional Convention which drafted the present Constitution, and the only thing which may be pertinent here was the following statement by Senator McReynolds, who handled the matter on the floor of the Convention (Debates of the 1943-44 Constitutional Convention, page 4002):

"Mr. President, the first paragraph[sentence] of that section is a copy of the present Constitution. The eight subdivisions or allotments for the appropriations of funds represents some change and some additions from the present section. The present section contains seven sections[classifications]. This one as re-written contains eight and is changed from the original one by the addition of, I think, public health and public welfare. There was

Honorable Richard H. Ichord

some question in the Committee as to the wisdom and propriety of the particular section or the necessity of it. However, the majority of the members of the Committee thought it represented an excellent safeguard and since a provision of that kind was in the present Constitution they were inclined to retain it, and for that reason, with the rewriting of the classifications to conform to the present conditions, the old section has been retained. I move its approval."
(Words in brackets supplied.)

In State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S.W. 1093, l.c. 1096, decided in 1901, the Missouri Supreme Court expressed its views as to the purpose of the provision contained in the 1875 Constitution as follows:

"* * * *We think the purpose of the framers of the constitution, among possibly others, was to prevent an adjournment of the legislature without making the necessary appropriations for the support of the state government and its various educational, penal, and eleemosynary institutions, and the prompt payment of its obligations as they matured, and in this manner prevent extravagant and extraordinary appropriations in excess of the estimated and probable revenues of the state.* * *"

While the constitutional provision in question may be susceptible of such construction, it does not expressly provide that bills containing appropriations falling within the various categories must be finally passed by the General Assembly in the precise order set forth therein, and the language is not so clear and unambiguous as to prevent some more reasonable interpretation. In this connection, it is significant that the present provision does not contain the more explicit language of the 1875 Constitution which provided that "no General Assembly shall have power * * * *to give priority in its action to a succeeding over a preceding item as above enumerated."

It is elementary that constitutional restrictions upon legislative powers must be construed strictly in favor of the power of the General Assembly and that they should not be deemed to apply if any reasonable doubt exists as to their repugnancy to the act under review. McGrew v. Missouri Pacific Railway Co., 230 Mo. 496, 132 S.W. 1076; Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196; State v. Wilson, 265 Mo. 1, 175 S.W. 603; State ex rel. Heimberger v. Board of Curators of University of Missouri, 268 Mo. 598, 188 S.W. 128.

In construing a constitutional provision, one should not attribute

Honorable Richard H. Ichord

to it a meaning, not necessarily required by its language, which is unreasonable and impractical in result and is not essential to its purposes. To hold in this instance that, even though appropriations are made for all of the listed categories, the order of passage of the appropriation bills is controlling, and may invalidate some appropriations, would give effect to form rather than substance, without serving any real purpose. It would be impractical and contrary to established and orderly legislative procedure, would make the validity of appropriations a matter of chance, and would render invalid many appropriations made in the past.

Under such an interpretation, it would be necessary to rigidly limit each bill to appropriations within a particular category. This has not been done in the past; and, incidentally, if this were undertaken, there could be substantial differences of opinion as to the categories in which numerous appropriations belong. In any event, any such rigid classification of appropriations would result in piecemeal consideration of closely related matters.

Under existing circumstances, it is obviously impossible for the General Assembly to complete its consideration of one appropriation bill before it starts on another; and, where several bills are under consideration at the same time, the precise order in which they are finally passed may be a matter of chance and one which is difficult to control. Even if the order of passage could be controlled, this would result only in delay, with bills as to which there were no disagreements being held up while differences as to others were resolved.

The real purpose of the constitutional provision is to prevent a General Assembly from making appropriations in the lower categories and failing to make appropriations in the preceding ones. Where a General Assembly makes appropriations in all of the categories before it completes its work, the purpose of the provision has been accomplished, regardless of the order in which the bills containing the appropriations are passed. The constitutional provision should be so construed as to accomplish this purpose and not to impose technical requirements which are not necessary to accomplishment of that purpose.

CONCLUSION

It is the opinion of this office that, where the General Assembly makes appropriations in all of the preceding categories, an appropriation in a particular category set forth in Section 36, Article III, Constitution of Missouri, is not unconstitutional because such appropriation is contained in a bill which is finally passed in advance of the final passage of the bill or bills containing the appropriations in the preceding categories.

Honorable Richard H. Ichord

In answer to the specific question presented, it is the opinion of this office that the proposed appropriation for county aid road purposes, which falls within the seventh category, will not be invalid, because of the aforesaid constitutional provision, if it remains in House Bill No. 4 and that bill is finally passed in advance of final passage of the bills containing appropriations in the first six categories, assuming that the latter bills also are passed.

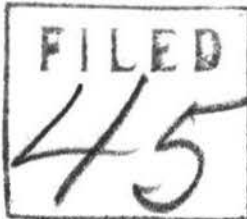
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John C. Baumann.

Yours very truly,

JCB:mw

John M. Dalton
Attorney General

OPTOMETRIST: A registered apprentice may get a new registration certificate under a new sponsor, upon compliance with other applicable laws, when original sponsor has become deceased.



April 25, 1958

Honorable Norbert J. Jasper
Representative, Franklin County
819 West Second Street
Washington, Missouri

Dear Mr. Jasper:

In your request to this office on April 1st, 1958, for an opinion, you state as your problem the following:

"A registered apprentice is practicing Optometry under a certificate issued in 1941, and renewed each year since, under a sponsorship of a registered Optometrist. The sponsoring Optometrist passed away and two registered Optometrists are now working in this office. Is there any reason why a new student certificate under the sponsorship of one of the now practicing Optometrists should not be issued to the party holding the certificate sponsored by the deceased Optometrist?"

We direct your attention to Section 336.080, RSMo 1949, which reads:

"Every registered optometrist and every registered apprentice who continues in active practice or service, shall, annually, on or before the first day of April, renew his certificate of registration and pay the required renewal fee. Every certificate of

Honorable Norbert J. Jasper

registration which has not been renewed on or before said first day of April shall expire. Any registered optometrist who permits his certificate to expire may renew same within five years of expiration upon payment of the required restoration fee and presentation of satisfactory evidence to the state board of optometry of his attendance during said five years at educational optometric programs, or their equivalent; provided, that said educational programs or said equivalent shall be approved by said board."

We also quote Section 336.020, RSMo 1949:

"After the first day of October, 1921, it shall be unlawful for any person to practice optometry or attempt to practice optometry without a certificate of registration as a registered optometrist issued by the state board of optometry. After the first day of October, 1943, it shall be unlawful for any person to serve, or attempt to serve as an apprentice under a registered optometrist without a certificate of registration as a registered apprentice issued by the state board of optometry prior to said first day of October, 1943, or renewal of such certificate. No new certificate of registration shall be issued to any apprentice after October 1, 1943."

It is our belief that for the purposes of renewal of a certificate of registration of a registered apprentice it is not necessary as a prerequisite that the signature of the original sponsoring optometrist be required when the inability to obtain such signature is the result of the death of the original sponsoring optometrist. Although the purposes of the statutes cited are evidently to eliminate in the future the possibility of some becoming licensed optometrists without the benefits of a formal training and education as required by the statutes, it is highly improbable that the legislature

Honorable Norbert J. Jasper

would have intended the tenure of one registered as an apprentice to be contingent upon the life expectancy of the original sponsoring optometrist. It would appear that the signature of the sponsoring optometrist is not solely indicative of the capability of the registered apprentice, but is for the purpose of indicating to the licensing board that the one seeking the registration is qualified in the eyes of the sponsor. Given all the other qualifications for the renewal of the registration certificate of the apprentice, it would be an injustice to the individual to deny that renewal merely because the original sponsor became deceased. It should be possible to accomplish a renewal of the certificate of registration with the substitution of the signature of a new sponsor when the original has become deceased, and it is our opinion that it was not the intention of the legislature that this should be prevented.

With respect to the last sentence of Section 336.020, it is our opinion that this was not intended to prevent the renewal of a certificate of registration after October 1, 1943, unless there has been an expiration of the certificate, but was intended to prevent anyone from becoming a registered apprentice who had not so become prior to that date.

CONCLUSION

It is the opinion of this office that when a sponsoring optometrist of a registered apprentice who has complied with the laws applicable to renewal of the certificate of registration has become deceased it will not be a bar to the renewal of the certificate of registration under the sponsorship of another registered optometrist.

Yours very truly,

John M. Dalton
Attorney General

JBS:vlw

COUNTIES: Jackson, Platte, Clay, and Cass counties may
COUNTY CONTRACTS: contract for county planning jointly with
REGIONAL PLANNING: Federal government.
COUNTY COOPERATION:
PLANNING AGENCY.

November 12, 1958

FILED

45

Honorable Randall S. Jessee
Executor Director
Metropolitan Area Planning Council
701 Railway Exchange Building
Kansas City 6, Missouri

Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Sometime ago you were kind enough to prepare and forward to us an opinion concerning the powers for metropolitan area planning available to the Counties of Clay, Platte and Cass. I refer to your letter of May 29, 1958. A copy of this letter was forwarded to Albert M. Cole, Administrator of the Housing and Home Finance Agency in Washington.

"I have just received a letter from Mr. Cole, a copy of which is enclosed. Apparently he feels that a further clarification from your office is required on two points:

- "1. Can the Counties of Jackson, Clay, Cass and Platte join in the formation of a planning agency with regional planning jurisdiction of their combined area, including Kansas City?

(It has probably been called to your attention that Cass County recently, through a referendum vote, acquired the power to do planning in the county.)

- "2. Would such a planning agency have authority to receive and expend funds including Federal grants and to contract with the Federal Government with respect thereto?"

Honorable Randall S. Jessee

It is our understanding that the proposal for a contractual relationship between the counties of Jackson, Clay, Cass and Platte is one to make recommendations and plans which may or may not be adopted by any of such counties. It is further our understanding that any of such counties may ignore all or any part of a plan formulated by the joint efforts of the counties, or may adopt whatever part of the plan such county feels is desirable.

In the opinion of May 29, 1958, the Attorney General held that the counties of Platte, Clay and Cass have power to contract, singly or jointly, with a planning agency to formulate plans for general land use, upon the approval by the voters of each of such counties of the proposal to adopt county planning and zoning.

The basis for the holding in the opinion of May 29, 1958, was that under the provisions of Section 70.220, Cum. Supp. 1957, counties may contract to engage in activities jointly, if they are authorized to engage in such activities individually. Section 70.220 Cum. Supp. 1957, provides as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition, or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Sections 64.010 to 64.160, RSMo 1949, provide for the creation and functioning of a county planning commission in counties of the first class. Since Jackson County is a county of the first class, such sections provide the authority for Jackson County to engage in county planning. Since Jackson

Honorable Randall S. Jessee

County is authorized to engage in county planning, and since the counties of Clay, Platte, and Cass are authorized to engage in county planning when an affirmative vote is received in such counties on the proposal to adopt county planning and zoning, the provisions of Section 70.220 authorize a co-operative agreement between such counties, jointly, to engage in formulating a plan for the area of such counties.

Section 70.220 further authorizes counties to contract with an agency of the United States.

Therefore, it is our view that Jackson County and the counties of Clay, Platte and Cass, when the voters of such counties have authorized the adoption of county planning and zoning, may enter into a contract for planning for the area of such counties, and may contract with an agency of the Federal Government to receive and expend funds, including Federal grants. However, it is our view that such counties have no authority to enter into a contract to formulate a plan which would include the area of Kansas City.

The basis for the contractual relationship entered into under Section 70.220 is that the subject of the contract or co-operative action is within the scope of the powers of the political subdivisions so contracting.

Section 400 of the Charter of Kansas City provides as follows:

"There shall be a city plan commission consisting of eight members who shall serve without pay and who shall be appointed by the mayor. The mayor shall designate one of such members as chairman of the commission. The members of the city plan commission at the time this charter takes effect shall constitute the first commission hereunder for the remainder of their terms. Appointment of successors shall be for a term of four years, said term beginning on the tenth day of April in the year the appointment is made. In addition, the city manager, president of the board of park commissioners, director of public works, director of the water department, and director of welfare shall be advisory members without vote. The commission shall have power to prepare or recommend plans for (a) the location, extension, widening, construction, or improvement of streets, trafficways, boulevards, parks, playgrounds, community centers, other recreation facilities, public buildings, bridges, viaducts and subways; (b) a system or systems of widening and opening various through streets so as to relieve traffic con-

Honorable Randall S. Jessee

gestion; (c) matters of transit and transportation; (d) districting and zoning the city as to use to which property may be put, and regulating the height, area and use of buildings and premises; (e) the improvement of the river front and flood protection; (f) the supervision and regulation of platting and opening sub-divisions; (g) the future physical development of the city. The commission shall recommend such state and municipal legislation as may be necessary to carry out its plans."

It is clear that planning jurisdiction of the area of Kansas City is by Section 400 of the Charter of that city given to the Kansas City Plan Commission. Therefore, it is our view that planning for Kansas City would not be within the scope of the powers of the Planning Commission of Jackson County. It would follow that the cooperative agreement entered into between Jackson County and the counties of Clay, Cass, and Platte, if the voters of such county approve county planning and zoning, would not authorize such counties to formulate a plan which would include the area of Kansas City.

CONCLUSION

It is the opinion of this office that Jackson County and the counties of Clay, Cass and Platte, if county planning and zoning is authorized by vote in such counties, have authority to enter into a contract for the formulating of a plan for the area of such counties. Such contract would not confer authority on such counties to formulate a plan which would include the area of Kansas City. Such counties would be authorized to contract with an agency of the United States and could receive and expend funds including Federal grants.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,

John M. Dalton
Attorney General

CBB/ld

COUNTY PUBLIC WATER SUPPLY
DISTRICTS: MISSOURI PUBLIC
SERVICE COMMISSION:



Public Service Commission of Missouri does not have jurisdiction over county public water supply districts incorporated under Sections 247.010 to 247.220, RSMo 1949, as amended; and property owner in such water supply district seeking to enforce extension of services to his property, must seek his remedy through the circuit court.

January 8, 1958

Honorable John W. Joynt
Member, Missouri State Senate
St. Louis 1, Missouri

Dear Sir:

Your request for a formal opinion in relation to Public Water Supply District No. 3, St. Louis County, presents the following question:

If a property owner in a county public water supply district, formed under Sections 247.010 to 247.220 RSMo 1949, as amended, seeks to force extension of such water district's services to his property, is his remedy obtained through application to the Missouri Public Service Commission, or by suit in the circuit court?

A review of the statutes referred to in the preceding question does not point out a remedy for the property owner's alleged wrong done to him, but we do find an obligation in this respect alluded to in the following language from *Grossman v. Public Water Supply District No. One of Clay County*, 339 Mo. 344, 1.c. 352, 96 S.W. (2d) 701:

"A legislative intent is plainly disclosed that the system shall be properly operated and maintained and that necessary extensions and enlargements shall be made."

While the query posed presents a "service" question as distinguished from a "rate" problem, we feel that the following language from Section 247.110 RSMo 1949, in the basic law governing

Honorable John W. Joynt

county public water supply districts, makes it necessary to review the Missouri Public Service Commission Law to find the extent of its regulatory powers, if any, over county public water supply districts:

"Subject to such regulation and control as may now exist in or may hereafter be conferred upon the public service commission of the state of Missouri, the fixing of rates or charges for water or water service furnished by a district incorporated under sections 247.010 to 247.220 is hereby vested in its board of directors. * * *"

At this point reference is made to Senate Bill No. 154, passed by the 69th General Assembly of Missouri and now found as Section 247.215 RSMo Cum. Supp. 1957. Such enactment was an amendment to the county public water supply district law we are now considering and constituted a new power to be vested in such districts. Paragraph 1 of Section 247.215 RSMo Cum. Supp. 1957, provides, in part, as follows:

"1. The board of directors of any public water supply district which is dependent upon purchases of water to supply its needs may sell and convey part or all of its water mains, plant, real estate, or equipment to any water corporation as defined in section 386.020, RSMo, if all bonds of the district, whether general obligation bonds constituting a lien on the property within the district, or special obligation or revenue bonds constituting a lien on the income and revenue arising from the operation of the water system: * * *". (Underscoring supplied)

The above quotation from a recent legislative enactment discloses that the legislature was fully cognizant of the fact that a water corporation as defined in Section 386.020 RSMo 1949 of Missouri's Public Service Commission Law was distinguishable from a county public water supply district formed under Sections 247.010 to 247.220 RSMo 1949, as amended.

A rule to guide us in searching out the regulatory powers of the Public Service Commission of Missouri is reflected in language found in *Katz Drug Company v. Kansas City Power & Light Co.*, (Mo. App.) 303 S.W. (2d) 672, 1.c. 679, as follows:

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"* * * the commission is a body of limited jurisdiction and has only such powers as are conferred upon it by statutes, and such incidental powers as may be necessary to enable the commission to exercise the powers granted. * * * It 'has no authority to adjudicate and determine individual or personal rights. * * * because under the Constitution the Legislature has no power or authority to invest such Commission with judicial powers.'"

Section 386.250 RSMo 1949, provides, in part, as follows:

"The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter.

* * * * *

"(7) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operations of same within this state; provided, that nothing contained in this section shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or system in any city of this state, except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality; * * *."

Section 386.020 RSMo 1949, Cum. Supp. 1957, a part of the Public Service Commission Law of Missouri, defines "water corporation" in the following language:

"21. The term 'water corporation', when used in this chapter, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station,

Honorable John W. Joynt

distributing or selling for distribution,
or selling or supplying for gain any water."
(Underscoring supplied).

Under the laws of their incorporation, county public water supply districts are, by Section 247.020 RSMo 1949, denominated "political corporations of the state of Missouri," as distinguished from private business corporations. Does such a political corporation render its services for gain? We have carefully reviewed Sections 247.010 to 247.220 RSMo 1949, as amended, and have not discovered in such law any indication that such political corporations are clothed with any legal characteristics which would cause them to be referred to as "public utilities" as the same are alluded to in the following language from State ex rel. Washington University v. Public Service Commission, 308 Mo. 328, 1.c. 344, 272 S.W. 971:

"The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon their funds invested. The police power of the State demands as much. We can never have efficient service unless there is a reasonable guaranty of fair returns for capital invested. The woof and warp of our Public Service Commission Act bespeaks these terms. The law would be a dead letter without them, and a commission under the law, that would not read the law in the proper spirit, would be breathing into it the flames of ultimate deterioration of public utilities."

County public water supply districts have no private investors of funds, certify no tax levies except those necessary for the economical and proper management of the districts, and are readily distinguishable from public utility corporations for profit which are subject to the jurisdiction of the Public Service Commission of Missouri. It must therefore be reasonably concluded that a resident property owner in a county public water supply district, formed under Sections 247.010 to 247.220 RSMo 1949, as amended, who seeks to force extension of the water district's services to his property does not enforce such alleged right by invoking the jurisdiction of the Public Service

Honorable John W. Joynt

Commission of Missouri. His alleged right under circumstances peculiar to each case may be protected by invoking the jurisdiction of the circuit court, a court of general jurisdiction having both equity and law jurisdiction.

CONCLUSION

It is the opinion of this office that the Public Service Commission of Missouri is without jurisdiction over county public water supply districts incorporated under Sections 247.010 to 247.220 RSMo 1949, as amended, and a property owner in such water supply district seeking to enforce extension of the water district's services to his property must seek his remedy through the circuit court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

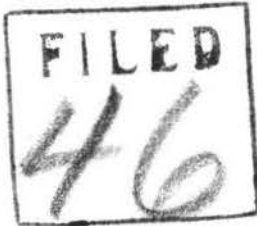
Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw:hw

ESTATE TAXES:
INHERITANCE TAXES:
ADDITIONAL STATE TAX ACT:

Section 145.070, RSMo 1949, imposes an additional tax on estates when the inheritance, legacy and succession taxes, etc., paid to the state, do not equal the credit authorized by the Federal estate tax act.



July 23, 1958

Honorable William G. Johnson
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Johnson:

We are in receipt of your request for an official opinion on the following question:

"The Probate Judge of this county asked me to obtain a statement from you in clear and understandable english of the meaning of Section 145.070."

Section 145.070, RSMo 1949, reads as follows:

"In the event that the total of the estate, inheritance, legacy and succession taxes imposed upon the several interests and property comprising the estate of the decedent, by law, less exemptions allowed by law, and all other state inheritance and estate taxes, shall not equal the maximum credit now or hereafter allowable to the estate of such decedent against the United States federal estate tax imposed with respect thereto, whenever the federal estate tax is determined, an additional tax shall then be imposed upon the value of the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said section 145.060, including all other state inheritance and estate taxes, and the credit for estate, inheritance, legacy and succession taxes allowable to the estate of such decedent against the United States

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federal estate tax."

The above statute causes trouble to most people because it is found in Chapter 145, RSMo 1949, which is entitled - "Inheritance Tax." Actually, Section 145.070, RSMo 1949, is an "estate tax" and not an inheritance tax. See *Brown vs. State*, 19 S.W. 2d 12.

The generic term that covers both methods of taxation, i.e., inheritance tax and estate tax, is "death tax;" although in very popular language it is not unusual to find the term "inheritance tax" applied to the right of the state to tax regardless of the method of taxation that is adopted. *Prentice-Hall Inheritance and Transfer Tax Service*, p. 101.

There is, however, a definite distinction between the terms - inheritance and estate taxes. If the power of the state to tax is exercised by a tax placed on the transmission of property from the dead to the living, the tax is called an estate tax. If the tax is exercised by taxing the receipt of property by the living from the dead, the tax is called an inheritance tax.

In Missouri, Chapter 145, supra, taxes the receipt of property by the heirs. As the Missouri Supreme Court has stated, the Missouri tax imposed by Chapter 145, supra, is on the right to receive the property; not a tax on the right of the deceased to transfer the property after his death. See *Priedeman vs. Jamison*, 356 Mo. 627, 202 S.W. 2d 900(1947); *In re: Bernay's Estate*, 344 Mo. 135, 126 S.W. 2d 209, (1939); *In re: Rosing's Estate*, 337 Mo. 544, 85 S.W. 2d 495(1935).

The Supreme Court of Missouri upheld the constitutionality of Section 145.070, supra, on the ground that it did not violate the due process clause of the Federal Constitution in the case of *Brown vs. State*, supra, by saying:

"* * * If the state has power to regulate or tax the privilege either of transmitting or receiving property within its territorial jurisdiction in any manner or amount it pleases, how can it be said that any measure the state chooses to adopt short of complete confiscation is a violation of the due process clause of the federal constitution? * * * Objection overruled."

Before setting out the meaning of Section 145.070, supra, it might be well to review briefly the history and purpose of the Missouri

Honorable William G. Johnson

Legislature in enacting the original Missouri estate tax law. In order for one to have an understanding and working knowledge of the Missouri estate tax law it is essential to understand the purpose and legislative background for said enactment. It must also be understood that we are dealing with an estate tax and not an inheritance tax law.

The Congress of the United States passed an act entitled "An Act to reduce and equalize taxation to provide revenue, and for other purposes" which was approved on February 26, 1926 (See Title 26, U.S.C.A. 2001 (IRC, 1954)). Said Act imposed a Federal estate tax on the property of decedents, varying in percentage according to the net value of the estate and under said Federal Revenue Act a credit was allowed against the Federal estate tax due to any amount lawfully assessed and paid to any state as an estate, inheritance, legacy or succession tax. Said credit and deduction credit, however, being limited to 80% of the amount due the Federal Government under said Federal state tax. Subsequently, the State of Missouri, by an act of its General Assembly, approved on April 7, 1927, passed an estate tax which imposed an additional tax on the assets of Missouri estates equal to the difference between the inheritance or transfer taxes then exacted and 80% of said Federal estate tax, said section read:

"In the event that the total of the inheritance taxes imposed upon the several interests and property comprising the estate of the deceased, by law, less exemptions allowed by law, and all other state inheritance taxes, shall not equal eighty per centum of the amount of the tax imposed upon the value of the net estate of said decedent, under the federal estate tax law, whenever the federal estate tax is determined an additional tax shall then be imposed upon the value of the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said section 573 as amended and eighty per centum of the tax imposed by said act of congress." (This section is a re-enactment of Section 573, R.S. Mo. 1929, which section first appeared in Laws 1929, at page 103. The last mentioned act repealed the original Missouri estate tax law, found in Laws 1927, at page 100.)"

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Although this particular act was not in substance exactly the same law as we are operating under today, it is, however, the same in principle, and an understanding of its operation and application is essential in order to compare the way the present law functions. In essence, what these two acts mean is that the Federal Government by passing the Federal estate law of 1926 said, we are going to impose a federal tax on estates of a certain net value but we are also going to allow a credit against this tax equal to 80% of the inheritance taxes, etc., paid to the state. The Missouri Legislature, therefore, took the position that since an estate could get credit up to 80% of the tax owed the Federal Government for expenses paid out by the estate in the way of inheritance, legacy, etc., taxes, there would be instances in which the total inheritance taxes, etc., paid to the state would not total up to 80% and, consequently, the Federal Government would be getting taxes which could be the state's and all that would have to be done would be for the Legislature to impose additional tax on the assets of the estate so that they would total up to 80% of the total tax due the Federal Government.

Another way and, perhaps, the best way to explain the principle and meaning of the additional tax law or estate tax in Missouri under the original act would be for us to illustrate by an example:

(1) Assume the total Federal estate tax assessed was \$1000. Now, assuming also that the total inheritance and legacy taxes paid to the State of Missouri totaled \$600. Under the Federal law which imposed the Federal estate tax, the statute authorized a credit for inheritance, legacy, etc., taxes paid to the state, but said credit could not be more than 80% of the estate tax owed the Federal Government. In this example, applying the Federal credit, the estate would get credit for the \$600 paid to the State of Missouri and would pay \$400 to the Federal Government as estate tax.

(2) The Missouri Legislature then passed the additional tax or estate tax. Here is how said act would apply on the above example: Since the estate could have received a credit of 80% of the total Federal estate tax due or, in this case, \$800, and since the taxes paid by the estate to the State of Missouri only totaled \$600 the Missouri act imposed an additional tax upon the value of the net estate equal to the difference between the total of the tax imposed by the state inheritance tax, etc., laws (\$600 in our example) and 80% of the tax imposed by the Federal statute. In other words, the state took the position that they might just as well have the other \$200 instead of allowing the Federal Government to have said amount since the Federal act authorized a credit up to 80% or \$800 on the total amount of tax due the Federal Government, or \$1000 in this case.

Therefore, it can be seen that what the additional tax law in Missouri does is to make certain that every estate takes advantage

Honorable William G. Johnson

of the Federal credit and also secures additional taxes for Missouri. The estate pays no more taxes. It merely pays the amount to the state instead of the Federal Government. The case of Brown vs. State, supra, is in accord with this position. For in that case the Supreme Court of Missouri declared the purpose of the additional tax or estate tax to be and we quote:

"The apparent purpose is to amend the then existing article entitled 'Inheritance Tax' by providing in two new sections for a minimum tax on the estate of decedents of 80 per cent of the amount of tax imposed under a designated act of Congress, and it is clearly expressed in the above title.
* * * * *"(Emphasis ours.)

Under the present law, Section 145.070, supra, the purpose, meaning and principle remain the same as they did under the 1929 Act, supra; however, there is no fixed 80% credit in our present statute. Congress substituted for the 80% fixed credit an "escalator" type credit which authorizes credit at 8/10 of 1% on the amount of estate tax owed the Federal Government which exceeds \$40,000 and stair steps to a final credit of \$1,082,800.00 plus 16%, as provided for in Internal Revenue Code, 1954, Section 2011 entitled, credit for state death taxes, to wit:

"If the taxable estate is:

← The maximum tax credit shall be:

Not over \$90,000	8/10ths of 1% of the amount by which the taxable estate exceeds \$40,000.
Over \$90,000 but not over \$140,000 . . .	\$400 plus 1.6% of the excess over \$90,000.
Over \$140,000 but not over \$240,000 . .	\$1,200 plus 2.4% of the excess over \$140,000.
Over \$240,000 but not over \$440,000. . .	\$3600 plus 3.2% of the excess over \$240,000.
Over \$440,000 but not over \$640,000. . .	\$10,000 plus 4% of the excess over \$440,000.
Over \$640,000 but not over \$840,000. . .	\$18,000 plus 4.8% of the excess over \$640,000.
Over \$840,000 but not over \$1,040,000. .	\$27,600 plus 5.6% of the excess over \$840,000.
Over \$1,040,000 but not over \$1,540,000	\$38,800 plus 6.4% of the excess over \$1,040,000.
Over \$1,540,000 but not over \$2,040,000	\$70,800 plus 7.2% of the excess over \$1,540,000.
Over \$2,040,000 but not over \$2,540,000	\$106,800 plus 8% of the excess over \$2,040,000.

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If the taxable estate is:

The maximum tax credit shall be:

Over \$2,540,000 but not over \$3,040,000. . .	\$146,800 plus 8.8% of the excess over \$2,540,000.
Over \$3,040,000 but not over \$3,540,000. . .	\$190,800 plus 9.6% of the excess over \$3,040,000.
Over \$3,540,000 but not over \$4,040,000. . .	\$238,800 plus 10.4% of the excess over \$3,540,000.
Over \$4,040,000 but not over \$5,040,000. . .	\$290,800 plus 11.2% of the excess over \$4,040,000.
Over \$5,040,000 but not over \$6,040,000.. ..	\$402,800 plus 12% of the excess over \$5,040,000.
Over \$6,040,000 but not over \$7,040,000 . .	\$522,800 plus 12.8% of the excess over \$6,040,000.
Over \$7,040,000 but not over \$8,040,000 . . .	\$650,800 plus 13.6% of the excess over \$7,040,000.
Over \$8,040,000 but not over \$9,040,000 . . .	\$786,800 plus 14.4% of the excess over \$8,040,000.
Over \$9,040,000 but not over \$10,040,000. . .	\$930,800 plus 15.2% of the excess over \$9,040,000.
Over \$10,040,000.	\$1,082,800 plus 16% of the excess over \$10,040,000."

We are of the opinion that the 1929 additional tax law, supra, is the same in meaning and in purpose as the present Missouri additional tax law, i.e., as re-enacted. Once you understand the operation of the former, the meaning of the latter will be clear and understandable. The computation of the additional tax owed the state can be made in three steps, to wit:

- A. Using the Federal estate tax rate, as set out in the Internal Revenue Code, 1954, compute the amount of the basic Federal estate tax owed by the estate.
- B. Total up all the estate, inheritance, legacy and succession taxes imposed upon the several interests and property comprising the estate of the decedent, by law, less exemptions allowed by law, and all other "state" inheritance taxes.
- C. If the total derived at in B, above, does not equal the "escalator" credit authorized by the Internal Revenue Code, supra, then - - AN ADDITIONAL TAX SHALL THEN BE IMPOSED UPON THE VALUE OF THE NET ESTATE OF SAID DECEDENT EQUAL TO THE DIFFERENCE BETWEEN THE

Honorable William G. Johnson

TOTAL OF THE TAX IMPOSED UNDER SECTION 145.060
(this section sets out the rate of Missouri's
Inheritance tax), including all other state
inheritance and estate taxes and the credit
allowed to the estate of such decedent against
the Federal estate tax.

CONCLUSION

It is, therefore, the opinion of this office that Section 145.070, RSMo 1949, imposes an additional tax on the net assets of an estate, notwithstanding the fact that inheritance taxes, etc., have already been imposed under Section 145.060, supra, and payable to the State of Missouri, whenever the total inheritance, legacy and succession taxes payable to the state do not equal the credit authorized by the Federal estate tax act, Internal Revenue Code, supra.

We are of the further opinion that Section 145.070, supra, is an estate tax and not, strictly speaking, an inheritance tax.

The foregoing opinion, which I hereby approve was prepared by my assistant, Mr. J. Burleigh Arnold.

Yours very truly,

John M. Dalton
Attorney General

JBA:mw

TAXATION:
COUNTY ASSESSORS:
STATE TAX COMMISSION:

The assessment blanks for use in Jackson County, Missouri, must contain a classification of all tangible personal property as specified in Section 137.120, RSMo 1949, including such items as farm machinery, livestock and other domesticated animals and that the State Tax Commission has no authority to delete said items from the assessment blank.



May 28, 1958

Mr. Richard H. Koenigsdorf
Assistant County Counselor
Jackson County
Suite 202 Courthouse
Kansas City, Missouri

Dear Mr. Koenigsdorf:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"For some several years the assessor of this county has been criticized and, in some instances, ridiculed by residents of the county and the local press because of the form used here for filing property lists for the purpose of assessment for taxation, because of the many items thereon that have little or no practical application to this county. Of course, the assessor has no control over this matter and does not prescribe the form, and in the opinion of this office can make no changes by reason of the statutory provisions in the Revised Statutes of Missouri, 1949, sections 137.115, 137.120, 137.335 and 137.360.

"I am enclosing a copy of the return which is used here, although I am sure you are familiar with same, and you will note it sets out in detail a listing of livestock and farm machinery, including such unusual items as 'asses, jennets, domesticated rabbits and other animals, chickens, guineas, etc.' It is my humble opinion that, if most of the residents of this county met a jennet going down the street they would fail to recognize same, and we might even have a little problem as to stallions, mares and geldings.

Mr. Richard H. Koenigsdorf

"The serious aspect of this inappropriate form is that it might have a tendency to encourage some disrespect for the tax laws of this state and consequently result in failure to regard them as seriously as they should.

"The questions to you are, first, if the opinion of this office is correct that the assessor of Jackson County, Missouri, has no authority to change the form presently used; secondly, if so would it be appropriate to request of the State Tax Commission a change of this form so that it will be more in line with the requirements of this county, or if such request would be improper because of the statutory requirements and duties controlling the State Tax Commission in the preparation of forms."

Section 138.380, RSMo 1949, relating generally to the powers and duties of the State Tax Commission, provides that it shall be the duty of said Commission to prescribe the forms used in the assessment and collection of the general property tax, in the following language:

"It shall be the duty of the state tax commission, and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

* * * * *

"(5) To prescribe the form of all blanks and books that are used in the assessment and collection of the general property tax, except as otherwise provided by law."

Section 137.110, RSMo 1949, provides as follows:

"The state tax commission shall design the necessary assessment blanks and they, together with the assessment books, shall be furnished by the county clerk at the expense of the county, and shall be turned

Mr. Richard H. Koenigsdorf

over to the assessor at least sixty days prior to January first of each year."

Relating specifically to the duty of the State Tax Commission to design the necessary assessment blanks for use in counties of the first class, Section 137.335, RSMo 1949, provides as follows:

"The state tax commission shall design the necessary assessment blanks, which blanks shall contain a classification of all tangible personal property and the designed blanks shall be furnished to the county assessor sixty days before January first of each year. After receiving the form of the assessment blanks, the assessor or his deputies shall, between the first day of January and the fifteenth day of May of each year, unless the time be extended for good cause shown by order of the county court for a period expiring not later than May thirty-first, proceed to make and complete a list of all real and tangible personal property in the county and assess the same at its true value in money."

You will note that the assessment blank is required to contain a classification of all tangible personal property.

Section 137.115, RSMo 1949, provides that the assessor shall, upon receipt of the necessary forms, proceed to make a list of all tangible personal property in his county and assess the same at its true value in money. Paragraph 2 of the same section provides that the person (property owner) listing the property shall enter a true and correct statement of such property in a printed blank prepared for that purpose, which statement shall be signed and either affirmed or sworn to. See also Section 137.340, RSMo 1949, relating specifically to the making of lists in counties of the first class.

Section 137.120, RSMo 1949, relating to the contents of the assessment list, provides as follows:

"Such lists shall contain:

- (1) A list of all the real estate and its value;

Mr. Richard H. Koenigsdorf

(2) A list of all the livestock, showing the number of colts, yearlings, two year olds and all other horses, mares and geldings and their value; the number of colts, yearlings, two year olds and all other asses and jennets and their value; the number of colts, yearlings, two year olds and all other mules and their value; the number of calves, yearlings and all other neat cattle and their value; the number of pigs and all other hogs and their value; the number of lambs and all other sheep and their value; the number of kids and all other goats and their value; the number of domesticated rabbits, domesticated animals of all kinds and all other livestock and their value; the number of poultry including chickens, guineas, ducks and geese and their value, the number of turkeys and their value, the number of bee colonies and their value;

(3) An aggregate statement of all tractors, combines, threshing machines, drilling machines, power balers and all other farm machinery and implements and their value;

(4) A statement of household property, including the number of pianos and other musical instruments, radios, clocks, watches, chains and appendages, sewing machines, washing machines, refrigerators, gold and silver plates, jewelry, household and kitchen furniture and the value thereof;

(5) All trucks, motorcycles, airplanes and all other motor vehicles and their value;

(6) All steamboats, keelboats, wharf boats and all other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all paintings and statuary, and every other species of tangible personal property not exempt by law from taxation."

We have examined the assessment blanks used in Jackson County and find the same to be in substantial compliance with the various designations of personal property contained in Section 137.120, supra.

Mr. Richard H. Koenigsdorf

We, of course, recognize the fact that a detailed list of farm machinery and livestock, including such items as stallions, mares, geldings, jennets, domesticated rabbits and other animals, chickens, guineas, etc., have, in most instances, no application to the inhabitants of certain urban areas in Jackson County, Missouri.

It is our understanding that the State Tax Commission is in full agreement with the need for a change in assessment forms. However, said Commission is of the opinion that in prescribing the assessment blanks they are bound by the requirements for the listing of said tangible personal property as set forth in Section 137.120, supra. With this conclusion, this office is in complete agreement. The requirement that certain items of personal property be specifically listed on the assessment list is a matter within the wisdom of the General Assembly, and until the requirements of Section 137.120 are changed or eliminated we are of the opinion that the State Tax Commission has no alternative but is required to administer the law as written.

In answer to your inquiry, we wish to advise that we are in complete agreement with your opinion that the assessor of Jackson County, Missouri, has no authority to change the assessment blanks now used, for the reason that it is the duty of the State Tax Commission to design the forms for the assessment of the general property tax. Sections 138.380, 137.110 and 137.335, noted supra.

Further, we are of the opinion that it would be a useless gesture to request the State Tax Commission to change the forms presently used for the listing of tangible personal property, in view of the fact that the matters which you suggest should be eliminated from the form are required by law to be on said form and the Commission would be obligated to follow such requirements.

CONCLUSION

It is the opinion of this office that the assessment blanks for use in Jackson County, Missouri, must contain a classification of all tangible personal property as specified in Section 137.120, RSMo 1949, including such items as farm machinery, livestock and other domesticated animals and that the State Tax Commission has no authority to delete said items from the assessment blank.

Mr. Richard H. Koenigsdorf

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

BDG:lc:vlw:hw

INSURANCE:

Articles of Incorporation of Abraham Lincoln
Life Insurance Company.



January 8, 1958

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of January 6th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Abraham Lincoln Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE:

Articles of Incorporation of Church
Extension Brotherhood of America



January 20, 1958

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of January 16th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Church Extension Brotherhood of America, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

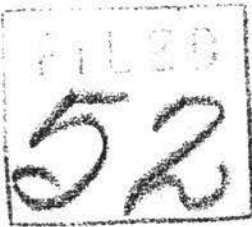
Very truly yours,

John M. Dalton
Attorney General

JLO:M:cmn

INSURANCE:

Described "automobile warranty" issued by National Warranties, Inc., not an insurance contract subject to regulatory provisions of Missouri insurance code.



February 14, 1958

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

In compliance with your recent request, this opinion construes an "automobile warranty" contract which National Warranties, Inc. proposes to issue in Missouri. It will be herein determined if the contract contains covenants and agreements which will cause it to be denominated a "contract of insurance," the offering for sale of which would be in violation of Section 375.310, RSMo 1949, providing a penalty for engaging in the insurance business without proper State authorization. In order that no doubt will exist as to the written provisions of the contract being construed, it is here quoted in its entirety:

Automobile Warranty
issued by
NATIONAL WARRANTIES, INC.
Tulsa, Oklahoma

OKLA No. 7

Valid Anywhere in the United States of America

This Warranty Protects.....The Owner of.....
Serial Number.....
Body Type.....Date Purchased.....
Issued by.....Speedometer Reading.....

NATIONAL WARRANTIES, INC., certifies that it has inspected the vehicle above described and certifies that in its opinion the parts hereinafter specified are in good working order and condition and will with normal usage require no repairs or replacements for one year from the date of purchase. National Warranties, Inc. agrees that if its said certification is in error, it will protect the retail purchaser of this vehicle and holder of this Warranty from any costs of repairs which may arise for one year from date of purchase on the following specific parts subject to the terms and conditions hereinafter set forth to the extent of the total reasonable price for repairs, replacement and labor which become necessary in the normal use of the above motor car:

Honorable C. Lawrence Leggett

MOTOR
Pistons, pins and rings,
valves, valve lifters, valve
stems, valve guides, valve
springs, oil pump and timing
gears.

Camshaft
Crankshaft
Bearings and
gaskets.

STANDARD TRANSMISSION
Gears, seals and
bearings within
housing.

AUTOMATIC TRANSMISSION
Gears, seals and bearings
within housing and electrical
mechanism in transmission.

CLUTCH
Disc.
Pressure plate
Release bearings.

STEERING
Front axle assembly
(except alignment and
adjustments).

REAR AXLE
Gears, bearings, oil
seals and gaskets
within housing.

BRAKES
Master brake cylinder
Wheel cylinders

This Warranty is for the exclusive use of the dealer to whom issued and of the retail owner named herein and is not transferable.

This Warranty is restricted to passenger cars only, which are neither registered for commercial use, nor cars used for hire, nor cars which are raced in any manner.

This Warranty is in full force for one year from the date of purchase noted hereon provided only however that a written confirmation from National Warranties, Inc. of protection hereunder is received by the holder of this Warranty within ten (10) days from date of purchase.

The necessity for repairs or replacement under this Warranty shall remain in the sole discretion and judgment of National Warranties, Inc. Written authorization must first be obtained before any repairs are made.

The holder of this Warranty is not protected for repairs or replacements not specifically listed in this Warranty, for adjustments or tune-ups, for repairs arising out of or revealed by collision, regardless of the contention that the specific failure was not caused by the collision, nor for any repairs caused by neglect, misuse or resulting from major alterations by Warranty holder not recommended by manufacturer.

Notify National Warranties, Inc. immediately if you do not receive required written confirmation from it of protection hereunder within ten days from date of purchase.

Honorable C. Lawrence Leggett

Notice of any needed repairs or replacements covered by this Warranty must be immediately given to National Warranties, Inc.

National Warranties, Inc. has insured its performance of each warranty and said warranty covers the purchaser anywhere in the United States of America.

NATIONAL WARRANTIES, INC.
Tulsa, Oklahoma

OKLA. No. 7

This is to certify that (name).....
(address).....has purchased.....
passenger car, serial number.....body type.....
on.....day of.....195.....and is entitled therefore
to full protection in accordance with the terms of the Automobile
Warranty issued to the above named purchaser.
Our check is attached hereto.

PURCHASER..... DEALER.....
(Signature)

.....
(Address) (Signature) (Title)

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S.W.
1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as
follows:

"The essential elements of a contract of insurance
are an agreement, oral or written, whereby for a
legal consideration the promisor undertakes to
indemnify the promisee if he shall suffer a speci-
fied loss."

The difference between a contract of warranty and an insurance
contract is indicated in the following language from State of Ohio
ex rel. Duffy v. Western Auto Supply Company, 134 Ohio St. 163, 16
N.E. 2d 256, 119 A.L.R. 1236, 1.c. 1240:

"A warranty promises indemnity against defects in
the article sold, while insurance indemnifies
against loss or damage resulting from perils out-
side of and unrelated to defects in the article
itself."

Honorable C. Lawrence Leggett

From Transportation Guarantee Co. v. Jellins, 174 P. 2d 625, 1.c. 629, we quote a rule to guide us:

"We are satisfied that a sound jurisprudence does not suggest the extension by judicial construction of the insurance laws to govern every contract involving an assumption of risk or indemnification of loss; that when the question arises each contract must be tested by its own terms as they are written, as they are understood by the parties, and as they are applied under the particular circumstances involved."

Even though we find the element of risk distribution in a contract, we must keep in mind the following language found in Jordan v. Group Health Association (1939), 71 App. D. C. 38, 107 Fed. 2d 239, 247:

"That an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements."

The automobile warranty being construed is applicable to a designated automobile owned by a particular person. It is issued only after the vehicle has been inspected and the warrantor or his inspector has inspected the vehicle for the purpose of bringing it within the warranty. The designated parts of the vehicle are certified to be in good working order at the time of inspection and it is further certified that they will with normal usage require no repairs or replacements for one year. It is apparent from a consideration of the warranty as a whole that it has as its dominant features services to be rendered, rather than a comprehensive risk coverage common to insurance regulated by statute.

CONCLUSION

It is the opinion of this office that the within described "automobile warranty" offered by National Warranties, Inc. is not a

Honorable C. Lawrence Leggett

"contract of insurance" and may be sold without such sale being subject to the regulatory provisions of Missouri's insurance code.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

SCHOOLS: Part of C-2 District of Audrain County
cannot be detached therefrom and attached
SCHOOL DISTRICTS: to Mexico District, either by annexation
or change of boundary lines, because the
two districts are not contiguous.

FILED

52

March 13, 1958

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Levvis:

This is in response to your request for opinion dated
February 19, 1958, which reads as follows:

"I desire your opinion on the following
statement of facts:

"Mexico School District No. 58 is a
six-man Board of Education School District.
Adjoining this District on the West is a
common School District known as Jesse
School District. Adjoining Jesse School
District on the West is a part of Consoli-
dated School District C-2.

"At the present time a petition has been
presented to the Directors of C-2 request-
ing that portion of C-2 lying South of
Highway No. 22 be detached from C-2 and
included within the boundaries and made
a part of the Mexico School District No.
58. Simultaneously a petition has been
presented to the Directors of Jesse School
District requesting that all territory in
Jesse School District be included in the
Mexico School District. Another petition
has been filed with the Board of Education
of the Mexico District requesting that the
territory included within the Jesse School
District and that part of C-2 lying South
of the Highway No. 22 be included within
the Mexico District.

Honorable Lon J. Levvis

"No part of C-2 District at the present time adjoins any part of the Mexico School District. However, if all three districts voted affirmatively for the proposed changes the lands would all be adjoining.

"There is further pending at this time petitions to the C-2 Directors to attach all of C-2 District North of Highway 22 into the Centralia School District and still another petition requesting that all that part of the C-2 District lying South of said Highway be included in the Centralia School District.

"The Directors of School District C-2 wish to be advised whether the petition to adjoin that part of the territory lying South of Highway 22 is a legal and valid petition, inasmuch as it is not now contiguous to the Mexico School District, although, as stated above, if approved by the Jesse School District, C-2 School District, and Mexico School District, the newly formed District, or at least the boundaries of the newly formed District, would be changed so as to constitute one completely attached School District.

"Reference is made to Sections 165.70 and 165.294 Revised Statutes of Missouri."

Although it is not clear from your request which of the several methods of alteration of school districts is being employed in this instance, we have examined them all and find that the petition which has been presented to C-2, asking that the part of C-2 lying south of the highway be included within the Mexico District, is invalid under any theory.

You have referred us to Section 165.170, RSMo, Cum. Supp. 1957, and Section 165.294, RSMo, Cum. Supp. 1957. In this connection we refer you to the case of State ex inf. Taylor ex rel. Schwerdt et al. v. Reorganized School Dist. R-3, Warren County, Mo. App., 257 SW2d 265, where the court said:

" * * * Section 165.170, supra, however, applies to common school districts and not to consolidated school districts, except

Honorable Lon J. Levvis

insofar as it is made applicable thereto
by section 165.293 RSMo 1949, V.A.M.S.
which confines its application to the pro-
visions relating to boundary lines. * * *

See also State ex inf. Conkling ex rel. Hendricks v. Sweaney,
270 Mo. 685, 195 SW 714; State ex inf. Pulley ex rel. Harrington
v. Scott, 307 Mo. 250, 270 SW 382; State ex rel. Consolidated
School Dist. No. 2 of Pike County v. Ingram, Mo. App., 2 SW2d 113.

These cases firmly established the fact that even when
Section 165.293, RSMo 1949, was in force, none of the provisions
of Section 165.170, authorizing the formation of new districts
or the division of districts, was applicable to six-director
districts. In lieu of the reference statute, Section 165.293,
Section 165.294, RSMo, Cum. Supp. 1957, was enacted, setting
forth the procedure to be followed by six-director districts in
changing boundary lines. Consequently, aside from reorganization,
there are only two methods authorized for the alteration of six-
director districts, i.e., change of boundary lines under Section
165.294, supra, and annexation under Section 165.300, RSMo, Cum.
Supp. 1957.

With regard to the petition which has been presented, asking
that all of Jesse District be encompassed within the boundaries
of the Mexico District, we might mention parenthetically that the
only method which can be employed to effectuate this purpose is
annexation under Section 165.300, not by change of boundary lines
under Section 165.294. See enclosed opinion to Edwin F. Brady
dated June 11, 1954.

In order for annexation proceedings to be available, the
territory sought to be annexed must adjoin the district to which
it is to be attached at the time the petition is presented. It
was so held in Willard Reorganized Dist. No. 2 of Greene County
v. Springfield Reorganized School Dist. No. 12 of Greene County,
Mo. App., 248 SW2d 435, 443, where the court said:

"We hold that the statutory requirement
involved in this case, that the school
districts be adjoining before proceedings
can be taken to annex the same, is manda-
tory."

Since C-2 does not adjoin the Mexico District at any point
at this time, no part of it can be annexed to the Mexico District.

Honorable Lon J. Levvis

We hardly need any citation of authority for the proposition that a change of boundary lines under Section 165.294, supra, contemplates contiguous estates, i.e., a common boundary line. However, we call attention to the following language of the court in Farber Consolidated School Dist. No. 1 v. Vandalia School Dist. No. 2, Mo. App., 280 SW 69, 1.c. 71:

" * * * The statutes named relate to separate and distinct methods of dividing and forming districts, annexing territory, and changing common boundary lines. State v. Scott (Mo. Sup.) 270 S.W. 382. * * *"
(Emphasis ours.)

See also the definition of "boundary" in Black's Law Dictionary, Second Edition, as follows:

"By boundary is understood, in general, every separation, natural or artificial, which marks the confines or line of division of two contiguous estates."
(Emphasis ours.)

Since "boundary" is not a technical word, it must be given its ordinary and usual meaning (§1.090, RSMo 1949), signifying a common boundary between two contiguous estates. Since the Mexico District and C-2 are not contiguous, there, of course, cannot be a change of boundary lines between them.

CONCLUSION

It is therefore the opinion of this office that the petition presented to Consolidated School District C-2 of Audrain County, requesting that a part of C-2 be detached therefrom and attached to the Mexico District, is void because the two districts are not contiguous.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

INSURANCE: Articles of Incorporation of Professional
Mutual Insurance Company



April 15, 1958

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Leggett:

In compliance with your request of April 11th, 1958, a copy of the original Articles of Incorporation of the proposed Professional Mutual Insurance Company, together with proof of publication of the same as required by Section 379.030, RSMo 1949, have been reviewed by this office pursuant to the directive contained in Section 379.220, RSMo 1949.

It is the opinion of this office that the Articles of Incorporation of the proposed Professional Mutual Insurance Company, to be organized pursuant to the provisions of Sections 379.205 to 379.310, RSMo 1949, are in accordance with the provisions of said cited statutes, and not inconsistent with the constitution and laws of this state and the United States.

Pursuant to your request, we return herewith the Affidavit of Publication in this matter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

Enclosure
JLO:M:om

INSURANCE: Described contract offered by E. B. Koonce Mortuary, Inc. is a contract of insurance, and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310, RSMo 1949.



April 21, 1958

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

In reply to your recent request, this opinion construes a contract of agreement purportedly offered to the public by E. B. Koonce Mortuary, Inc., a Missouri corporation. The contract is being examined with a view to determining if it is, in point of law, a contract of insurance, the issuance of which is subject to the provisions of Section 375.310, RSMo 1949, providing in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In order that no doubt will exist as to the written provisions of the agreement being construed, it is here quoted in its entirety, with only the names of the second party and his sister named in the agreement being omitted:

"This is not a burial league or insurance

E. B. KOONCE MORTUARY, INC.
Incorporated under the laws of the State of Missouri
KOONCE'S FUNERAL PLAN
CONTRACT OF AGREEMENT

Professional Group

E.B.KOONCE
President and Founder

MRS. E.B.KOONCE
Vice-President-Treasurer

Honorable C. Lawrence Leggett

"This agreement, made this 24th, day of September, 19 56 by and between the E. B. Koonce Mortuary, Inc., a Corporation of the City of St. Louis, party of the first part, and the person whose name appears in the space below, of the City of St. Louis, or St. Louis County, State of Missouri hereinafter known as the party of the second part.

"WITNESSETH:

"The party of the second part purchases of the party of the first part, the following services, articles, and merchandise:

"A casket, grave, (not to exceed \$35.00) removal of the body, shaving, hairdressing or haircutting, preservation of the body, dress or suit, personal service. In Memoriam Book, socks or stockings, underclothing, service of hearse and two (2) Limousines, one (1) Floral, One (1) telegram, funeral to be held at Church, Chapel or home. All of which the party of the first part agrees to deliver and perform in accordance with the terms of the agreement in the City of St. Louis, State of Missouri, or St. Louis County, through the facilities of the E. B. Koonce Mortuary, Inc., 1221 North Grand Blvd., St. Louis, Missouri, at the death of:

Contract Holders	Age	In the Event of Death, Notify	Relationship	Cost of Funeral	Payment
	68		Sister	550.00	1.25
Total Payments					

"Ninety (90) days after date of issue of this Contract, the Party of the first part agrees to furnish Ambulance Service without cost, (when Ambulance is available) to the party of the second part, from Residence in St. Louis, or

Honorable C. Lawrence Leggett

St. Louis County, Missouri, to any Hospital in St. Louis, or St. Louis County.

"In consideration of the above obligations of the party of the first part, the party of the second part agrees to pay to the party of the first part the sum of \$ 550.00 dollars, due and payable in payments of \$ 1.25 on Monday of each and every week.

"In the event the party of the second part fails to make the above payments to the party of the first part within ten (10) days after date due on this contract, then in that event, the party of the first part agrees to allow whatever sums that have been paid on this contract (less any amount of cost for collections) as a credit to apply on the cost of the funeral of the Contract Holder as set out in this agreement.

"In the event the party of the Second part dies before the final payment on this Funeral Contract, and all previous payments have been properly paid on date due, then in that event, the party of the first part agrees to perform the funeral rites of the deceased second party.

"In the event the party of the second part dies outside of the City of St. Louis or St. Louis County, Missouri the party of the First Part agrees to have the body returned to the City above mentioned at their expense, providing that the relatives, heirs or administrators contact the party of the First Part before the services of another funeral director are secured. The distance not to exceed 500 miles.

"In the event the party of the second part dies outside of the City of St. Louis or St. Louis County, Missouri, the party of the First Part will ship at their expense within an area of 500 miles, the above described casket, outside box, (no vault), clothing, underwear and floral.

Honorable C. Lawrence Leggett

"In the event of death of the second party, and remains of the deceased of the above named party are to be shipped to another City, County, or State, the party of the first part will prepare the remains in accordance with this contract, and deliver the remains to railroad station, and will purchase a ticket for the deceased only, for a distance not to exceed 500 miles. The party of the first part will not be responsible for any additional expense under the agreement of the terms of this contract.

"This contract is not assignable by the above named party for whom the funeral services are to be performed. This contract shall be of no force or effect unless upon the date hereon it be delivered and signed by the party of the first part or their legal representative to the party of the second part, and must be signed in the presence of the party of the first part or their legal representative by the party of the second part.

"This Contract Shall Not Be Binding On Either Party Until 90 Days After the Date of Issue.

"IN WITNESS WHEREOF, the parties hereunto have executed this agreement in the presence of each other on the day and year first written above.

E. B. KOONCE MORTUARY, INC.

By /s/ E.B.Koonce First Party

SEAL

And _____ Second Party

WITNESS _____ "

Reverse side of Contract provides:

"E. B. KOONCE MORTUARY, INC.
Incorporated under the laws of
the State of Missouri

Contract No. 16879

Honorable C. Lawrence Leggett

"

Name

This Contract is Null And Void
if Payments Are One Week in Arrears.

In the event of the death phone

E. B. KOONCE MORTUARY, INC.
1221 North Grand Boulevard
Jefferson 5-2240"

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In the case of State ex inf. v. Black, 145 S.W. (2d) 406, 347 Mo. 19, 1.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of

Honorable C. Lawrence Leggett

Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of State ex rel. Reece v. Stout, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S. W. (2d) 827, 1.c. 829:

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

Honorable C. Lawrence Leggett

In the case of Knight v. Finnegan (D.C.Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Summarizing the essential provisions of the contract of agreement fully described in the forepart of this opinion, we find E. B. Koonce Mortuary, Inc., agreeing to sell to the contract holder designated services, articles and merchandise, to be delivered upon the death of the contract holder. As consideration for such services, articles and merchandise, the contract holder agrees to pay E. B. Koonce Mortuary, Inc., the sum of Five Hundred and Fifty Dollars due and payable in payments of One Dollar and Twenty-Five Cents per week, the aggregate sum being referred to in the agreement as "cost of funeral." In the event of default by the contract holder in making his weekly payments, we find a provision on the reverse side of the agreement providing: "This contract is null and void if payments are one week in arrears." While no provision is found in the agreement for reinstatement after default, we do find that whatever sums have been paid on the agreement at time of default, "less any amount of cost for collections" will be allowed "as a credit to apply on the cost of the funeral of the contract holder." If the agreement is null and void upon default, there is no way for the contract holder or his legal representative after his death to compel E. B. Koonce Mortuary, Inc., to furnish services and merchandise of the value of \$550.00.

In searching this agreement for the "risk" element so essential to a contract of insurance, it may be found in the following provision:

"In the event the party of the Second part dies before the final payment on this Funeral Contract, and all previous payments have been properly paid on date due, then in that event, the party of the first part agrees to perform the funeral rites of the deceased second party."

We do not construe the foregoing quoted provision from the contract to mean anything less than that E. B. Koonce Mortuary, Inc. will furnish a funeral, accompanied by services and merchandise mentioned

Honorable C. Lawrence Leggett

in the contract, of a value of \$550.00. To fully pay out the contract price of the funeral at \$1.25 per week would require approximately eight years. In promising to fulfill the contract at any time before the final payment thereunder, E. B. Koonce Mortuary, Inc. undertakes a "risk" which causes the contract to be one of insurance. The contract price of services and merchandise to be rendered may or may not have any true relation to the amount paid in by the contract holder prior to his death, depending on how near the contract expiration date the contract holder dies. Hence, we have present in the contract the element of "risk" essential to an insurance contract.

CONCLUSION

It is the opinion of this office that the within quoted contract of agreement purported to be offered by E. B. Koonce Mortuary, Inc. is a contract of insurance within the meaning of Section 375.310, RSMo 1949, and offering of the same to the public without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons and corporations so offering such contracts to be subject to the penalties prescribed by Section 375.300 and 375.310, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

Enclosure
JLO'M:om

INSURANCE: Articles of Incorporation of Old Missouri Life Insurance Company.



April 23, 1958

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of April 22nd with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Old Missouri Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLG'M:cm

INSURANCE: Articles of Agreement of Mid-America Insurance Company



May 13, 1958

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of May 12, 1958, an examination has been made of an executed copy of the Articles of Agreement of the proposed Mid-America Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLD:M:cm

INSURANCE: Superintendent of Insurance has right of visitation and examination of records and affairs of Missouri corporate attorney in fact for a domestic reciprocal or inter-insurance exchange to the extent that the records of the attorney in fact disclose the financial condition of the reciprocal or inter-insurance exchange. Failure to permit such examination is grounds for revocation or suspension of license to conduct an insurance business in Missouri through the attorney in fact.



July 3, 1958

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your inquiry reading as follows:

"I wish to have an official opinion on the extent of my power or authority, as Superintendent of Insurance, to examine into the affairs of a corporate Attorney-in-Fact for a reciprocal exchange doing business under the provisions of Sections 375.790 to 375.920, inclusive, RSMo 1949, as amended.

"As you know, such corporate Attorneys-in-Fact are organized under Chapter 351 of the General Corporation Laws. It has been the practice of the Division of Insurance to make regular examinations of reciprocal exchanges the same as other insurance companies under my supervision and control. My question is, does the Insurance Code, particularly Sections 375.060 and 375.070, RSMo 1949, authorize me to examine into the affairs of the corporate Attorney-in-Fact for such reciprocal exchanges? In using the term 'examine into the affairs' I intend to use it in the comprehensive sense it is used in the statutes just referred to."

Reciprocal or inter-insurance contracts are authorized by the following language from Section 375.790, RSMo 1949, as amended:

"(1) Individuals, partnerships and corporations, of this state, hereby designated subscribers, are hereby authorized to exchange

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either assessable or non-assessable reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other states and countries, providing for indemnity among themselves, for the following purposes, to-wit: * * * ."

The single medium by and through which reciprocal or inter-insurance contracts are effected is an attorney in fact, as evidenced by the following language found in Section 375.800, RSMo 1949:

"Such contracts may be executed by an attorney in fact herein designated attorney, duly authorized and acting for such subscribers and such attorney may be a corporation. The office or offices of such attorney herein defined as an exchange, may be maintained at such place or places as may be designated by the subscribers in the power of attorney."

The real indispensability of an attorney in fact in effecting reciprocal or inter-insurance contracts is evident when we note the following language of the Supreme Court of Missouri in the case of Yeats vs. Dodson, 345 Mo. 196, 1.c. 204, 127 S.W.(2d) 652, as the Court quoted approvingly from Wysong vs. Automobile Underwriters, 204 Ind. 493, 184 N. E. 783:

"In the Wysong case it is said that 'there must be an attorney in fact for the reason that under the plan of insurance in question all business is done and transacted by an attorney in fact'."

Reference to Section 375.800, RSMo 1949, supra, discloses that it is the office or offices of the attorney in fact which are defined as "an exchange" and such office or offices are to be maintained at "such place or places as may be designated by the subscribers in the power of attorney."

As a condition precedent to the exchange of reciprocal or inter-insurance contracts by subscribers at the office of the attorney in fact (the exchange) such subscribers, through their attorney in fact, are required by Section 375.810, RSMo 1949, to file a verified declaration upon the oath of the attorney in fact with the superintendent of insurance disclosing, among other things, "that there is in the possession of the attorney in fact available for the payment of losses,

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assets conforming to the requirements of sections 375.840 and 375.850." Under Section 375.840, RSMo 1949, and under Section 375.850, RSMo 1949, as amended, we find rigid requirements relative to maintaining reserve funds, guaranty funds, and claim or loss reserve funds at the office of the attorney in fact (the exchange).

Section 375.870, RSMo 1949, provides for the submission of annual statements by the attorney in fact disclosing the financial condition of affairs at the office where such reciprocal or inter-insurance contracts are written and exchanged, and this statute further provides for examination, by the superintendent of insurance, into the business affairs and assets of the reciprocal or inter-insurance exchange, as shown at the office of the attorney in fact. This statute is of major importance in this opinion and consequently we quote Section 375.870, RSMo 1949, in its entirety, as follows:

"1. Such attorney shall make an annual report to the superintendent of insurance for such calendar year, showing that the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency provided for herein and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers, and the amounts retained for expenses; provided, however, that such attorney shall not be required to furnish the names and addresses of any subscribers.

"2. The business affairs and assets of said reciprocal or inter-insurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by the superintendent of insurance, as often as he sees fit and the cost thereof shall be paid by the exchange examined."

Subparagraph 2 of Section 375.870, RSMo 1949, quoted above, is clear in its language authorizing the superintendent of insurance to examine the business affairs and assets of reciprocal or inter-insurance exchanges, "as shown at the office of the attorney thereof." If such attorney in fact is a corporation, as clearly authorized by Section 375.800, RSMo 1949, supra, reason will support no other conclusion than that the superintendent may examine the corporate

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attorney in fact to the degree necessary to determine the definite status of the business affairs and assets of the reciprocal or inter-insurance exchange.

Under the provisions of Section 375.890, RSMo 1949, the annual certificate of authority issued by the superintendent of insurance, by virtue of which reciprocal or inter-insurance contracts are exchanged by subscribers at the exchange through their attorney in fact, is procured by the attorney in fact. For any such attorney in fact, whether it be individual or corporate, to refuse the superintendent of insurance the right of visitation and examination of its records pertaining in any degree to the financial condition of the reciprocal or inter-insurance exchange, for whom the attorney in fact is acting, would constitute a breach of conditions as such term is used in subparagraph 2 of Section 375.890, RSMo 1949, reading as follows:

"2. The superintendent of insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by sections 375.790 to 375.920, after reasonable notice has been given said attorney in writing, so that he may appear and show cause why action should not be taken."

To point up the fact of inseparability of a reciprocal or inter-insurance exchange and the attorney in fact, for the purpose of regulation by the superintendent of insurance, we extract the following language from *In Re International Underwriters, Inc.*, 157 F. Supp. 367, l.c. 373:

"This gives point to the conclusion of inseparability of the Exchange and its attorney in fact. It emphasizes the reality of the attorney in fact as the actual insurer. To eliminate the existence of one deals a death blow to the other. To dissolve one dispenses with the other."

The question posed in the request for this opinion is ruled by reliance on statutes embraced within that group of statutes, Sections 375.790 to 375.920, RSMo 1949, as amended, which have special application to the operation and regulation of reciprocal or inter-insurance exchanges. Consequently, for the purpose of this opinion, it is not deemed necessary to treat Sections 375.060 and 375.070, RSMo 1949, referred to in the request for this opinion.

Honorable C. Lawrence Leggett

CONCLUSION

It is the opinion of this office that Section 375.890, RSMo 1949, and related statutes cited, give the superintendent of insurance in Missouri the right of visitation and examination of the records and affairs of a corporate Missouri attorney in fact to the extent that such records disclose the financial condition of the reciprocal or inter-insurance exchange for whom the corporate attorney in fact is acting; and a failure by the attorney in fact to permit such an examination will constitute a breach of conditions as such term is used in subparagraph 2 of Section 375.890, RSMo 1949, with a consequent suspension or revocation of license to conduct its insurance business being the prescribed penalty.

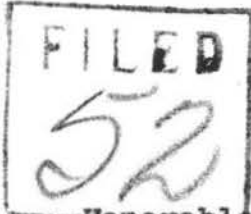
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'N:om

CORONER'S INQUEST: (1) Sheriff not allowed fee for summoning jurors for
SHERIFFS' FEES: coroner's inquest. (2) Sheriff not allowed mileage for
WITNESS FEES: travel in connection with coroner's inquest. (3)
JURY FEES: Sheriff allowed fee for summoning witnesses to attend
coroner's inquest. (4) Jurors and witnesses summoned
to attend coroner's inquest receive statutory per diem fee regardless of
number of summons they received or number of inquests actually attended
on same day. (5) Where multiple deaths result from one casualty, coroner
should conduct one inquest to determine cause of death of all persons who
died as a result of said casualty.



July 28, 1958

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Levvis:

This is in answer to your opinion request to this office dated
May 31, 1958, which reads as follows:

"On May 18, 1958, in this county, six persons died, all within a few minutes of one another, as a result of two connected automobile collisions; that is, car number 1 evidently struck car number 2 from behind and caused car number 2 to collide headon with car number 3. The persons killed were in cars number 2 and number 3.

"The Audrain County coroner issued to the sheriff of said county, under section 58.260 of the statutes, six separate warrants (one for the body of each of said six persons who had died) requiring the sheriff to summon juries, each to be of six citizens of the county, to appear before the coroner, all at the same time and place, for inquests concerning said six dead bodies. The sheriff summoned as jurors the same six citizens under all of said six warrants. He made return of all six warrants as directed therein and as provided by section 58.270 of the statutes.

"When the coroner delivered said jury warrants to the sheriff he (the coroner) placed in the sheriff's hands also six separate subpoenas (one for each dead body) for witnesses to be summoned for said inquests. The names of the same group of witnesses were entered on all six of said subpoenas. The sheriff summoned said witnesses and made returns, accordingly, on all six of said subpoenas.

Honorable Lon J. Levvis

"At the time appointed, the persons summoned as jurors and those summoned as witnesses appeared before the coroner.

"From that point to the end the coroner treated the proceedings as one inquest into the deaths of all of said six deceased persons. The six citizens summoned as jurors viewed the six bodies at one time and were sworn to inquire into all of the deaths, etc. One examination of the witnesses was made. The jury returned one verdict. It dealt with all six deaths.

"The sheriff claimed for each of the six warrants executed by him and for each of the six subpoenas served by him (as for six cases--he had to make written returns on each jury warrant and each subpoena) the modest fees allowed him for such services and, I believe, some mileage. The coroner questioned the propriety of the sheriff's claims and consulted the County Court (see 58.570 of the statutes). The County Court referred the coroner to me for an opinion. I do not find anything in our statutes or the Missouri court decisions that expressly answers the questions involved. Therefore, I request your opinions on the following questions."

and which asks four questions for our opinion, each of which will be considered in turn.

"Q. No. 1: The sheriff having received and executed six separate jury warrants as stated above and having received and served, and having made his returns on, six separate subpoenas for witnesses as stated above, should the coroner pay the sheriff his fees and mileage computed and claimed as for six inquests?"

In answer to your first question, we are enclosing herein an opinion rendered by this office on June 10, 1949, to the Honorable Ted A. Bollinger, Prosecuting Attorney of Shelby County, Missouri. This opinion holds on page four that "Although a coroner's inquest has been held not to be a part of a criminal prosecution, it has been held to be 'one step taken in the enforcement of the criminal laws of the land.'" This in effect holds that a coroner's inquest is a criminal and not a civil proceeding. Under this opinion, a sheriff who performs certain acts in connection with a coroner's

Honorable Lon J. Levvis

inquest is to be allowed the fees provided by statute for his services in criminal cases. The fees allowed a sheriff for his services in criminal cases are set out in Section 57.290, Cum. Supp., 1957, as follows:

"1. Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

For serving and returning each capias, for each defendant.....	\$1.00
For serving a writ of attachment for each person actually brought into court.....	1.00
For serving every writ of execution.	1.00
For entering return of non est on a capias or attachment.....	.50
For a return of nulla bona.....	.50
For summoning a jury to ascertain the sanity or pregnancy of a convict, drawing the inquisition, and returning the same.....	2.00
For summoning a grand jury.....	4.20
For summoning a petit jury and calling same at the trial.....	1.00
For executing a special venire when one shall have been actually ordered and issued.....	2.00
For summoning each witness.....	.50
For every return of non est on a subpoena.....	.25
For serving any rule of court or notice.....	.50
For calling each witness.....	.05
For taking recognizance.....	.50
For committing any person to jail...	1.00
For every trial in a criminal case or confession.....	1.00
For every trial in a capital case...	3.00"

As can be seen from reading the above statute, there is no provision therein specifically allowing the sheriff a fee for the summoning of a jury for a coroner's inquest. The general rule is

Honorable Lon J. Levvis

that an officer is entitled to fees only when there is a clear statutory provision therefor. See *Nodaway County v. Kidder*, 344 Mo. 795, 129 S.W. (2d) 857. Applying this rule to Section 57.290, supra, it is our opinion that a sheriff who summons a jury for a coroner's inquest receives no fees for this service.

As to summoning witnesses, the statute provides for a fee of 50 cents to be allowed the sheriff for each witness summoned. As the provision of the statute allowing the sheriff a fee for summoning witnesses makes no differentiation between summoning witnesses in coroner's inquests and summoning witnesses in other criminal proceeding, it is our opinion that this fee would be allowed the sheriff for the summoning of witnesses in a coroner's inquest.

As to the mileage allowance a sheriff is to receive for travel in connection with a coroner's inquest, Section 57.300, RSMo 1949, provides the mileage allowances for sheriffs in criminal cases. This section provides as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

In our opinion to the Honorable Ted A. Bollinger, supra, the question was also raised as to the mileage allowance for sheriffs for travel in connection with a coroner's inquest. That opinion holds that the statute providing a mileage allowance for sheriffs refers to proceedings of court and that a coroner's inquest is not a court within the meaning of said statute. The opinion goes on to hold that a sheriff is not entitled to any mileage allowance for travel in connection with a coroner's inquest.

As to the fees allowed a sheriff for services rendered by him in connection with a coroner's inquest, Section 13 of Article VI of 1945 Constitution of Missouri provides as follows:

"All state and county officers, except constables and justices of the peace, charged

Honorable Lon J. Levvis

with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

"Q. No. 2: Although six jury warrants were issued as stated above, there having been but one inquest session and but one examination of the witnesses, and the inquest, as held, and the jury's verdict having been treated by the coroner as applying to all six of the dead bodies, are the members of the jury entitled to be paid as for having served at one inquest or six inquests?"

Section 494.170, RSMo 1957, provides in part as follows:

"1. Except as otherwise provided by law jurors shall be allowed fees for their services as follows:

(2) For each juror attending a coroner's inquest, day..... 3.00

"2. All fees allowed jurors as above shall be taxed as costs in the cases, respectively, in which they were summoned; but jurors serving in more than one case on the same day, at the same place, shall be allowed fees only in one case; and any juror, who claims fees for attending in two or more cases on the same day, at the same place, shall not be allowed fees for that day."

It is our opinion that the jurors attending the coroner's inquest referred to in your opinion request are to receive a fee of \$3.00 per day for every day they so attended said inquest. As is shown by the above statutory provision, the fee due a person who

Honorable Lon J. Levvis

is summoned as a juror on a coroner's jury is based on the number of days he attends as a juror and is not based on the number of inquests he is summoned to attend or in fact does attend as a juror.

"Q. No. 3: Under the same circumstances as are stated in question 2 above, are the witnesses who appeared entitled to fees and mileage (if any) for attending one inquest or six inquests?"

Section 491.280, RSMo 1957, provides in part as follows:

"1. Witnesses shall be allowed fees for their services as follows:

- (1) For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, three dollars;
- (2) For like attendance out of the county where witness resides, each day, four dollars;
- (3) For traveling each mile in going to and returning from the place of trial, seven cents;
- (4) * * *; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day."

It is our opinion that the witnesses attending the coroner's inquest referred to in your opinion request are to receive a fee of \$3.00 per day for every day they so attended said inquest as witnesses if they live within Audrain County and a fee of \$4.00 per day if they reside outside Audrain County. As to mileage fees of the witnesses, said witnesses should be paid seven cents for every actual mile they traveled in going to and from the place of the inquest.

"Q. No. 4: Under the circumstances described above, would it have been proper for

Honorable Lon J. Levvis

the coroner to have issued to the sheriff one jury warrant in which the names of all six dead persons were included, and, likewise, one subpoena for witnesses, with said subpoena made out to apply to inquiries into all six of the deaths?"

In answer to question number four, we are enclosing herein an opinion rendered by this office on March 6, 1953, to the Honorable Irvin D. Emerson, Assistant Prosecuting Attorney of Jefferson County, Missouri, which holds that the purpose of a coroner's inquest is to determine the cause of death of an individual or individuals and, if several deaths result from one calamity, then only one inquest should be held to determine the cause of death of all suffering death because of the calamity as the cause of death will be the same in each individual case. This opinion is further substantiated by Section 58.520, RSMo 1949, which reads in part as follows:

"Coroners shall be allowed fees for their services as follows, provided that when persons come to their death at the same time or by the same casualty, fees shall only be paid as for one examination: * * *."

CONCLUSION

It is the opinion of this office that a sheriff is not allowed a fee for summoning a jury in a coroner's inquest nor is a sheriff entitled to an allowance for mileage traveled in connection with a coroner's inquest.

It is the opinion of this office that a sheriff is to be allowed a fee of 50 cents for each witness summoned by him to attend a coroner's inquest. A sheriff is not entitled to retain these fees however.

It is also the opinion of this office that the jurors and witnesses summoned to attend the coroner's inquest should receive the statutory per diem fee regardless of the number of summonses they received to be present and sit as jurors or testify as witnesses.

It is also the opinion of this office that when multiple deaths result from one casualty, the coroner should conduct one inquest to inquire into the cause of death of all the persons who died as a result of said casualty.

Honorable Lon J. Levvis

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard W. Dahms.

Yours very truly,

John M. Dalton
Attorney General

Enclosures

INSURANCE: Certificate of Credit described in opinion is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310, RSMo 1949.



October 1, 1958

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion construes a Certificate of Credit purportedly issued and offered to the general public by The Brauningers, doing an undertaking business in Johnson County, Missouri. It is essential to determine if the Certificate of Credit evidences an agreement which will cause it to be, in legal effect, an insurance contract, the offering and sale of which would be in violation of Section 375.310, RSMo 1949, providing a penalty for engaging in the insurance business without proper State authorization. We here quote the language of the Certificate of Credit you submitted with your letter of inquiry:

"Value \$100 Certificate of Credit No. _____
Issued to NAME ADDRESS The Brauningers
Serving Johnson County Since 1933
LEETON--WARRENSBURG--KNOB NOSTER

"CERTIFICATE OF CREDIT VALUE, \$100.00

"The value of this Certificate is in the amount of \$100.00 (One Hundred Dollars) to be applied on funeral services and merchandise, so desired by the holder hereof, or by person or persons who are responsible for the disposition and funeral of the holder hereof, at THE BRAUNINGERS, the Funeral Home, Leeton, Warrensburg, Knob Noster, Johnson County, Missouri.

"For this Certificate of Credit, the holder agrees to pay to THE BRAUNINGERS, the amount of 50¢ (fifty cents) per month for a period of Fifteen Years, at which time, this Credit Certificate shall be considered Paid Up in Full, or, so long as the holder shall pay Fifty Cents each month to THE BRAUNINGERS, upon due proof of death at ANY time, this Certificate of Credit shall be honored in Full Amount of One Hundred Dollars, to be applied on funeral services furnished by THE BRAUNINGERS."

Honorable C. Lawrence Leggett

/s/ R. A. Brauninger
Signed: R.A.Brauninger.

"Each 50¢ Monthly Payment Placed in Trust.
(Limited Certificate)"

In addition to the Certificate of Credit quoted above, you have furnished this office with a newspaper advertisement purportedly referring to the Certificate of Credit and we quote it here in full.

"2000 MORE HOLDERS WANTED It makes no difference where YOU live--If YOU are 50 years of age or older--YOU may hold a Burial Certificate for 50¢ a month which DOES pay up and IS strictly in force after the first payment. Contact THE BRAUNINGERS Phone 456 LEETON WARRENSBURG KNOB NOSTER Serving Johnson County and Surrounding Area Since 1933."

Section 375.300, RSMo 1949, provides:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in insurance business, before such individual, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

Honorable C. Lawrence Leggett

Section 375.310, RSMo 1949, provides in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In the case of State ex inf. v. Black, 145 S.W. (2d) 406, 347 Mo. 19, 1.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

Honorable C. Lawrence Leggett

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of State ex rel. Reece v. Stout, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, 1.c. 829:

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

Honorable C. Lawrence Leggett

In the case of Knight v. Finnegan (D.C. Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Under the express terms of the Certificate of Credit heretofore quoted, The Brauningers, by R. A. Brauninger, grant a fully paid-up Certificate of Credit in the amount of \$100.00 to any holder thereof who agrees to pay and does pay fifty cents per month for fifteen years, such credit to be applied on funeral services and merchandise for the certificate holder to be furnished by The Brauningers. To such point the certificate is nothing more or less than a credit arrangement, but the essential "risk" element, so necessary to an insurance contract, comes into existence under that provision of the Certificate of Credit which stipulates that the Certificate of Credit is to be considered "Paid Up in Full" upon due proof of death of the certificate holder at "any" time. This simply means that funeral services and merchandise of the value of \$100.00 are promised for a consideration ranging from fifty cents to one hundred dollars, depending on whether the certificate holder should die before the certificate becomes fully paid-up by normal monthly payments over approximately fifteen years. No language in the Certificate of Credit requires that the certificate holder's estate or any other person meet the payments necessary to equal the value of the services and merchandise to be furnished in the event of the certificate holder's death prior to the normal life of the Certificate of Credit. The advertisement relating to the Certificate of Credit, and quoted above, further discloses the nature of the Certificate of Credit to be burial insurance.

CONCLUSION

It is the opinion of this office that the Certificate of Credit fully described in the foregoing opinion is a contract of insurance within the meaning of the language contained in Section 375.310, RSMo 1949, and offering of the same to the public without meeting requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such contracts to be subject to the penalties prescribed by Sections 375.300 and 375.310, RSMo 1949.

Honorable C. Lawrence Leggett

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:om

INSURANCE: Articles of Incorporation of MFA Life Insurance Company.



November 7, 1958

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of November 5th with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed MFA Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:om

COLLEGE BOOK STORES:
STATE PURCHASING OFFICE:

Funds expended by any public institution owned, managed or controlled by the state are subject to Sections 216.475 through 216.520, RSMo Cum. Supp. 1957, whether appropriated or local.



May 22, 1958

Honorable Elwood Long
State Purchasing Agent
First Floor, Capitol Building
Jefferson City, Missouri

Dear Mr. Long:

This is in reply to Mr. Edgar C. Nelson's letter of January 17th, 1958, in which was submitted a request for an opinion of this office as follows:

"Please ascertain by proper inquiry to the State Purchasing Office whether Section 216.475 through 216.520, R. S. Mo. 1949, pertaining to sale of products of prison industries in Missouri, applies to local funds of the College as distinguished from appropriated funds. I will illustrate my question as follows: If the Business Manager of the College needs a new desk to be paid for by appropriated funds, the case would be clear that the statute applies. Suppose the College Bookstore needs a new desk, and that it is to be paid for by proceeds of student purchases at the Bookstore; would the statute apply?

One section of the statute carries an inference that only purchases from appropriated funds are covered since it is provided that 'no claims for the payment of such articles shall be audited or paid without this certificate' (of non-availability)."

We believe that Section 216.510 of the Revised Statutes of Missouri, Cumulative Supplement 1957, is the controlling law in this problem, and we quote the first two paragraphs of that section:

Honorable Elwood Long

"1. All articles manufactured in the penal institutions of the state and not required for use therein may be furnished to the state, to any public institution owned, managed or controlled by the state, or to any political subdivision of the state, or to any institution thereof, at such prices as shall be determined as herein provided upon the requisition of the proper official or purchasing agent.

"2. No article so manufactured shall be purchased from any other source for the state or public institutions of the state unless the division of prison industries shall certify that the articles included in the requisition cannot be furnished or supplied within sixty days, or, in the event the same articles cannot be procured on the open market within sixty days, that the division cannot supply them within a reasonable time and no claims for the payment of such articles shall be audited or paid without this certificate. One copy each of the requisition or certificate shall be retained by the department."

We wish to particularly call your attention to the words in the first paragraph to the effect that the articles may be furnished to any public institution owned, managed or controlled by the state. We believe that these are the words which would be decisive in determining whether funds used by the state college should be expended in conformity with Sections 216.475 through 216.520, rather than any inference which we might draw with regard to appropriated or non-appropriated funds. It would be overlooking the ownership, management or control entirely, we feel, to hold that expenditures from local funds would not be subject to the provisions of paragraph two of Section 216.510. Paragraph two clearly states that no article so manufactured (articles manufactured in the penal institutions of the state) shall be purchased from any other source for the public institutions of the state unless by the exception of non-availability as is provided for in paragraph two. We see nothing in the law stating that these sections are applicable only when an audit is made by the state comptroller.

Honorable Elwood Long

CONCLUSION

It is the opinion of this office that in the expenditure of local funds by a public institution owned, managed or controlled by the state, such as Southwest Missouri State College Bookstore, such expenditure must be in compliance with Sections 216.475 through 216.520, Revised Statutes of Missouri, Cumulative Supplement 1957. It is the aspect of ownership, management and control of that public institution which determines the applicability of these sections to those purchases of articles manufactured in the penal institutions of the State of Missouri.

Very truly yours,

John M. Dalton
Attorney General

JBS:om

AFFIDAVITS:
STATE TREASURER:
STATE PURCHASING AGENT:

1. On delivery of those supplies procured through the office of the state purchasing agent and not followed by an invoice with the accompanying affidavit required by Section 26 of House Bill No. 12, 69th General Assembly,

Second Extraordinary Session, it does not come within the jurisdiction of the state purchasing agent to cancel the contract for the supplies as he would under his rules and regulations for breaches of contract.

2. Section 26, House Bill No. 12, 69th General Assembly, Second Extraordinary Session, is **September 22, 1958** meant to have no effect upon the method in which contracts are written and executed by the State of Missouri.

Honorable Elwood Long
State Purchasing Agent
First Floor Capitol Building
Jefferson City, Missouri



Dear Mr. Long:

This is in response to your request for an opinion of July 17th, 1958, which we quote as follows:

"Will you please give us your opinions in regard to purchasing supplies to be paid for out of the 2nd State Building Fund appropriations, with reference to House Bill No. 12, 69th General Assembly (Second Extraordinary Session), Section 26:

(1) On delivery of those supplies procured through the office of the state purchasing agent (with the approval of either the Chief of Planning and Construction or the Director of Public Buildings) and not followed by an invoice with the accompanying affidavit requested, does it come within the jurisdiction of the state purchasing agent to have to cancel the contract for the supplies as he would under his Rules and Regulations for other breaches of contract)?

(2) We accept contracts for supplies with accompanying explanations in bids explaining how they will be provided (that is, whether by the contracting firm or individual or through an arrangement with another person). Would that practice have to be ruled out in these contracts?

A revision of Rules and Regulations for the Procurement Section is now in progress and I would greatly appreciate an early reply from you."

Honorable Elwood Long

It is the opinion of this office that noncompliance with Section 26 of House Bill No. 12 of the 69th General Assembly, Second Extraordinary Session, would not be a reason for the cancellation of a contract for supplies by the State of Missouri. We quote Section 26:

"All bills, claims and demands presented for repairs, remodeling, rebuilding, construction, or any services or material furnished under the provisions hereof, including but not limited to architectural, engineering and consulting services of every kind and nature, shall be accompanied by an affidavit executed by the claimant containing a statement that the claimant has neither directly nor indirectly paid any consideration, either of money or any valuable thing to any person, firm or corporation for services or assistance of any nature whatsoever in securing said bid, contract, employment, or fee, as the case may be."

We believe that Section 26 is not a part of a contract solely because it has been enacted by the legislature. There is no suggestion that it has been incorporated into a contract by agreement of the parties. Rather than as a condition of the contract or a promise of the contract of which there might be a breach, we believe that Section 26 has been enacted as a condition precedent to receipt of payment for performance of such a contract. The party contracting with the state may have fulfilled all of its obligations existing under the contract itself, and it should not be the prerogative of the state to take advantage of the other party by a cancellation of the contract when there has been no breach.

Since the failure of the contracting party to submit the affidavit required by Section 26 does not constitute a breach of contract, it does not come within the jurisdiction of the state purchasing agent to cancel the contract for supplies as he would under his rules and regulations for breaches of contract.

With respect to your second question, we feel that it should be answered in the negative. Section 26 of House Bill No. 12 merely establishes the requirement of an affidavit to be submitted by the person or agency who secures the bid, contract, or employment, or fee, as the case may be. As we have stated in answer to your first question, Section 26 is not a part of the contract between the state and a second party. If the contract permits a

Honorable Elwood Long

third party to furnish all or a portion of the supplies, and yet the state is to make payment solely to the second party, that no payment is to be made to other persons mentioned in the contract, Section 26 requires only the second party to submit the affidavit. Therefore, it is our opinion that Section 26 is meant to have no effect upon the method in which contracts are written and executed by the State of Missouri.

CONCLUSION

It is the opinion of this office that:

1. On delivery of those supplies procured through the office of the state purchasing agent and not followed by an invoice with the accompanying affidavit required by Section 26 of House Bill No. 12, 69th General Assembly, Second Extraordinary Session, it does not come within the jurisdiction of the state purchasing agent to cancel the contract for the supplies as he would under his rules and regulations for breaches of contract.

2. Section 26, House Bill No. 12, 69th General Assembly, Second Extraordinary Session, is meant to have no effect upon the method by which contracts are written and executed by the State of Missouri

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Yours very truly,

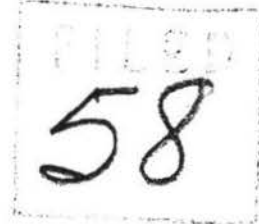
JOHN M. DALTON
Attorney General

JBS:mc

DIVISION OF HEALTH
REGULATIONS:

The Division of Health is authorized to make a regulation with respect to the length of vents for gas heaters in a tourist cabin.

December 1, 1958



Hon. Leon McAnally
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would like to have an opinion from your office concerning the validity and legality of a regulation made by the Division of Health, Jefferson City, Missouri and concerning tourist cabins.

"As I understand it Section 315.250 R. S. Mo. 1949 empowers the Division of Health to make regulations for the proper cleanliness and sanitation of tourist camps etc. The regulation in question governs the type and length of vents for gas appliances, specifically a gas fired water heater. The present vent provided by tourist cabin owner extends about two to three feet above cabin roof, but under the regulations of the Division of Health, in this particular case, the vent needs to be extended a few feet. The Division of Health thinks their regulation is necessary because a shorter vent might constitute a fire hazard, and they say also it is a protection against down draft which could possibly send carbon monoxide poisonous fumes back through the vent and into the cabin.

"I would appreciate an opinion from your office as to whether this venting regulation made by the Division of Health is valid and enforceable."

Hon. Leon McAnally

Section 315.250 RSMo 1949, referred to by you above, reads:

"The division of health may make such rules and regulations as it deems necessary for the proper cleanliness and sanitation of tourist camps, cabins or resorts and for the proper regulations of water supplies in connection therewith."

The above section confers upon the Division of Health the authority to enact regulations with reference to cleanliness, sanitation, and water supply. It would seem to be clear that if the Division has the authority to enact a regulation relating to the length of a vent of a gas heater that it must be upon the basis of their authorization to enact regulations regarding "sanitation" since this regulation obviously has nothing to do with water supply or cleanliness. Our problem then is to determine whether a grant of authority to the Division to enact regulations regarding sanitation is such a grant of authority as would embrace a regulation relating to the length of the vent of a gas heater.

In order to determine this matter we must of course attempt to determine how inclusive the word "sanitation" is.

Missouri cases on this point are very sparse. Indeed, we are able to find only one, an opinion rendered in 1883 by the Missouri Supreme Court in the case of Eyerman vs. Blaksley, 78 Missouri 145. In that case at l.c. 151 (4) the court stated:

"The word 'sanitary' embraces everything pertaining to the health of the inhabitants. ****"

In the California case of Huntington Laboratories vs. Onyx Oil & Chemical Company, 165 Federal 2nd 454, at l.c. 457 the Court of Customs and Patent Appeals stated that "sanitary" means of or pertaining to health. In the case of City of Wichita Falls vs. Robison, 46 S.W. 2d 965, the Supreme Court of Texas stated that the word "sanitary" had been defined as:

"Of or pertaining to health; designed to secure or preserve health; relating to the preservation or restoration of health; hygienic, as sanitary regulations, sanitary science."

Hon. Leon McAnally

Corpus Juris Secundum, Volume 39, Page 811, Section 1, states:

"Sanitation is the devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science."

In the case of State v. Fadely, 308 Pacific 2nd 537, at 1.c. 548 (14-18) the Supreme Court of Kansas stated:

"****The term 'public health' is not susceptible to accurate definition since it takes on new definitions when new conditions arise, but generally speaking, it means the wholesome sanitary condition of the community at large. 39 C.J.S., Health, § 1, p. 811. Among all the objects sought to be secured by government, none is more important than the preservation of the public health; and, an imperative obligation rests upon the state through its proper instrumentalities or agencies to take all necessary steps to accomplish this objective (25 Am. Jur., Health, p. 287, § 3). Statutes enacted for this purpose should be liberally construed and the most extensive power may be conferred on administrative boards, either state or local, to carry out such purpose.****"

It is well known that the effect on a human being of exposure to gas fumes in an enclosed area may cause varying degrees of illness and even of death. Thus it is evident that such exposure is injurious to health. In the cases cited "sanitation" has been defined as being a preservation of the public health and as the removal of elements injurious to health, which is the object of the regulation in question. In view of these facts we believe that the regulation is within the power of the Division of Health to make.

CONCLUSION

It is the opinion of this department that the Division

Hon. Leon McAnally

of Health is authorized to make a regulation with respect to the length of vents for gas heaters in a tourist cabin.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:mc

PUBLIC WORKS:
APPROPRIATIONS:

The State is not legally obligated by the terms of a contract for the construction of a public works project to pay to the contractor sums in excess of the amounts appropriated for said project.



February 10, 1958

Honorable Ralph McSweeney
Director
Division of Public Buildings
Capitol Building
Jefferson City, Missouri

Dear Mr. McSweeney:

Reference is made to your request for an official opinion, which request reads as follows:

"I will appreciate having a written opinion from your office in reference to payment of solid rock excavation in the Basement and Sewer lines in the New Administration Building at State Hospital #1, Fulton, Missouri.

"I will deliver to your office all contract documents in connection with this project."

From the information submitted with your opinion request and through conversations with you, we understand the facts surrounding the request to be as follow.

The 68th General Assembly, while in special session, appropriated \$1,014,000. for the purpose of wrecking and removing fire-damaged buildings and for the construction, furnishing and equipping of a new administration building at State Hospital No. 1, Fulton, Missouri (Laws of Mo. 1955, Extra Session, pp. 26 and 27.)

After the solicitation of bids, the State, on the 10th of July, 1956, entered into a contract in the amount of \$77,546. for the demolition and removal of fire-damaged buildings. Subsequent change orders resulted in a final contract price of \$73,748. and final payment was approved in April, 1957.

Thereafter, on the 28th day of May, 1956, the State entered into a contract for architectural services in connection with

Honorable Ralph McSweeney

the construction of a new administration building at State Hospital No. 1, Fulton, Missouri. Said contract provides for a fee of 6% of the cost of the construction work.

Thereafter, on the 19th day of February, 1957, the State received bids for the construction of said administration building and on the 28th day of February, 1957, the State entered into a contract for the construction of a new administration building at State Hospital No. 1, Fulton, Missouri, which contract called for an expenditure of \$868,959. Subsequent authorized change orders to date have resulted in an authorized contract price of \$874,882.20. The estimated architect's fee, computed at the rate of 6% of the contract price, would be in the amount of \$52,492.93.

Other miscellaneous expenses charged to said appropriation, and paid in whole or in part to date, include advertising costs, costs of test borings, compensation of a "clerk of the works" and architect's fees in conjunction with the demolition contract.

There remained in said appropriation on June 30, 1957, an unencumbered balance in the amount of \$1,742.51.

You inquire specifically as to the State's liability for payments to the contractor to cover the cost of solid rock excavation in the basement, connecting tunnels and sewer lines in connection with the construction of the administration building at State Hospital No. 1, Fulton, Missouri. We are informed that approximately 710 c. yards of solid rock was removed from the basements and areaways, 214.33 c. yards of solid rock removed from steam tunnels, 273 c. yards from sewer trenches and approximately 13.33 c. yards from a basement trench.

Division 3 of the detailed plans and specifications, entitled "Excavation, Backfilling & Grading", is, in part, as follows:

"SEC. 4 - EXCAVATING

* * * * *

"Material to be excavated is assumed to be earth and materials that can be removed with hand picks or air-driven spades. If stone or boulders that cannot be removed without use of air drills is encountered and removal is necessary, adjustments will

Honorable Ralph McSweeney

be made in contract based on agreed lump sum value in accordance with ART. 12 of the 'General Conditions'."

SEC. - 1 of said Division 3 provides that:

"The following work is not included under this Division:

Excavating and Backfilling for 'PLUMBING AND SEWERING WORK'.

Excavating and Backfilling for 'HEATING WORK'.

Excavating and Backfilling for 'ELECTRIC WORK'."

Article 12, referred to in the above noted provisions, relating to "Changes and Alterations", provides that the Director of Public Buildings shall value and appraise such changes and add to or deduct the same from the contract price.

We further understand that the contractor has not, to date, made any formal demand against the State for additional compensation for excavating solid rock as provided by Division 3 of the detailed plans and specifications, supra, nor has the Director of Public Buildings been requested to value and appraise the above referred to rock excavation for the purpose of allowing, if any, additional compensation. Until such conditions have been met, suffice it to say that we are of the opinion that no obligation rests upon the State to pay the same. However, realizing that such a limited and restricted answer would in nowise dispose of this matter, we will here assume that a proper demand for the allowance of extra compensation has been made and that the Director of Public Buildings has valued and appraised the excavation of solid rock, as above noted, in a specified amount. What, then, would be the obligation of the State to pay the same?

We first wish to direct attention to Section 8.220, RSMo 1949, which provides as follows:

"Whenever the state of Missouri shall pass a bill appropriating moneys for the erection of a public building or buildings, designating the amount or amounts and naming a commission or commissions, or board or boards or any persons to erect said building or buildings, or contract for the

Honorable Ralph McSweeney

same, said commissions, boards or persons shall not exceed the amount so appropriated for said purpose in any manner, but shall strictly comply with the act appropriating said moneys."

See also Section 8.250, RSMo Cum. Supp. 1957, which provides, in part as follows:

"* * * No contract shall be awarded when the amount appropriated for same is not sufficient to complete the work ready for service."

From the above two noted statutory provisions, we believe that it is clear that the State cannot become obligated for the expenditure of moneys in connection with public works projects in excess of the amount appropriated for said project. Consequently, we are of the opinion that a contract which purports to obligate the State above and beyond the limits of the appropriation available would be invalid insofar as the excess is concerned.

We note that one estimate fixes the cost of the rock excavation at \$33,760.20. However, we further note that such estimate is predicated upon (in addition to the basement excavation) excavation of rock from steam tunnels, sewer trenches and basement trench. We do not believe that the excavation of rock (exclusive of the basement excavation) would constitute an obligation of the State to grant additional compensation by operation of Division 3 of the detailed plans and specifications for, as above noted, the specifications exclude from the operation of said Division excavations for plumbing, sewerage, heating and electric work. We have examined fully the terms of the contract, together with all contract documents, and are unable to find any provision for additional compensation for the excavation of rock in conjunction with excavations for the installation of plumbing, sewerage, heating and electric work. Therefore, we are of the opinion that the State is not, under and by virtue of the terms of the contract, obligated to grant any additional compensation to the contractor for the excavation of rock in conjunction with the excavation required for the installation of plumbing, sewerage, heating and electric work.

The same source has estimated that the contractor has excavated 711 c. yards of rock from the basement proper and has further estimated that a proper allowance for said excavation

Honorable Ralph McSweeney

would be in the amount of \$26.40 per cubic yard. Such would result in an amount due the contractor, if the same were approved by the Director of Public Buildings, of \$18,770.40. A simple arithmetical calculation reveals that any portion of this amount over and beyond the unencumbered balance of the appropriation which might subsequently be appraised and allowed by the Director of Public Buildings would result in the total contract expenditures exceeding the original appropriation.

It is indeed difficult to say that the cost of the excavation of the solid rock from the basement, for which we believe the State would be obligated to pay the contractor a reasonable amount under the provisions of Division 3 of the detailed plans and specifications, supra, if there was an appropriation on hand unencumbered from which it could be paid, would be the construction costs which, in fact, caused the project expenditures to exceed the appropriation. This, we believe, for the reason that the contract should be considered as a whole and the expense to the State for the excavation of solid rock in the basement, under the terms of the contract, is as much a part of the contract as any other item of labor or materials furnished under said contract.

CONCLUSION

Therefore, in the premises, we are of the opinion that the State is not legally obligated by the terms of a contract for the construction of a public works project to pay to the contractor sums in excess of the amounts appropriated for said project.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:law

ELECTIONS:
SPECIAL ELECTIONS:
CHARTERS:
BOARD OF ELECTION COMMISSIONERS:

Special election for annexation to
City of Independence may be conducted
on same day as Jackson County charter
election.

September 29, 1958



Mr. John W. Mitchell
Secretary, Jackson County
Board of Election Commissioners
Courthouse
Independence, Missouri

Dear Mr. Mitchell:

This is in response to your request for an opinion dated
September 24, 1958, wherein you have submitted the following
questions:

"Is it legal and proper to conduct the
City Annexation Election on the same
date and using the same polling places
as the Charter Election?"

"If your opinion is that both elections
can be held at the same time and using
the same polling places can the Charter
election proposition and the Annexation
election appear in the same column on the
voting machine?"

We have conducted all the research that time permits in order
to ascertain whether there is any statute or judicial decision
which would prohibit the conduct of two special elections on the
same day. We have found no such statute or decision.

As we pointed out in our opinion to Floyd L. Snyder, Sr.,
dated July 29, 1958, the charter election must be held at a special
election which could not be on the same day as the general election
in November. The mere fact that you might conduct a special election
for annexation to the City of Independence on the same day that the
special election is being held for the adoption of a county charter,
would not change the character of the charter election. It would
still be a special election and we know of no reason why the two

Mr. John W. Mitchell

special elections could not be held on the same day.

If the two elections are held they would be governed by Section 111.255 RSMo Cum. Supp. 1957, in the appointment of judges, clerks, polling places, etc.

On this general problem we are enclosing for your assistance a copy of an opinion which this office rendered to Edward Garnholz, dated March 10, 1958.

We are unable to give you a definite answer to your second question because we do not have sufficient familiarity with voting machines in Jackson County. These are, of course, separate elections and the propositions must be submitted separately. Conceivably, there might be voters in Independence who would be qualified to vote on the charter election who would not have sufficient residence in Independence to vote on the annexation election. Therefore, the propositions would have to be placed on the voting machine so as to conform with Section 121.060(7). If this can be done by placing them in the same column we see no objection to doing so.

Conclusion

It is the opinion of this office that a special election on the question of annexation to the City of Independence may be conducted on the same day as the Jackson County charter election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John W. English.

Yours very truly,

John M. Dalton
Attorney General

JWI:mw
Enclosures(2)

MOTOR VEHICLE REGISTRATION:
TRUCKS EQUIPPED WITH
WINCHES MUST BE LICENSED:

Trucks driven on the highways from job
to job, or to garages for repair must
be registered.



May 15, 1958

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Mansfield, Missouri

Dear Mr. Moody:

This is in answer to your letter of April 28, 1958, in which
you request an opinion from this office as follows:

"I would like an opinion from your office
as to whether or not trucks whose beds have
been equipped with winches and used exclusively
for loading and unloading logs need to be
registered or licensed. These vehicles are
used in the woods or at the mills but driven
on the highways from job to job, or driven to
garages for repair.

"My question concerns only rubber wheeled
vehicles of standard width and length."

We direct your attention to Section 301.010, RSMo Cum. Supp.,
paragraph (15), which defines "Motor vehicle" as:

"any self-propelled vehicle not operated
exclusively on tracks, except farm tractors;"

and to paragraph (28) of this section which defines "Vehicle" as:

"any mechanical device on wheels, designed
primarily for use on highways, except those
propelled or drawn by human power or those
used exclusively on fixed rails or tracks."

We must also direct your attention to Section 301.020, which
we quote, in part, as follows:

Honorable Garner L. Moody

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing: * * * ." (Emphasis is ours.)

We must call to your attention that paragraph (15) of Section 301.010 is not in itself a complete definition; for without a more specific definition of the term "Vehicle", that paragraph, in conjunction with Section 301.020, has little meaning. Therefore, in determining which motor vehicles will come within the provisions of Section 301.020, we must look to paragraph (28), the definition of "Vehicle." Consistent with an opinion rendered by this office of March 25, 1949, which is enclosed, we see that such motor vehicle is to be a mechanical device on wheels, designed primarily for use on highways.

We also wish to consider the intention of the legislature in enacting the motor vehicle registration laws, and in so doing we bring to your attention the case of State ex rel. D. C. McClung v. Becker, 288 Mo. 607. The court in that case, at 1. c. 612, stated in part:

"The state maintains roads and bridges at great expense and exacts a license fee for the privilege of driving or operating these high powered vehicles thereon. It is clear, therefore, that the registration fee is not a tax on the vehicle, but upon the privilege of operating it on the highways of the state."

By the opinion of March 25, 1949, it was determined that a well drilling rig was not required to be registered as a motor vehicle. However, in that opinion it was stated:

"The motor power used for that purpose is also used to propel the apparatus from one location to another. However, such use would be merely incidental to the primary purpose for which it was designed, to wit, the drilling of wells."

Honorable Garner L. Moody

We believe that in view of the purpose of the motor vehicle registration act that portion of the definition of a vehicle which states that it is to be designed primarily for use on highways is to be construed strictly, and that when a motor vehicle shall be operated or driven upon the highways of this state, even though it has been converted for uses in addition to that for which it was primarily designed, the owner would be subject to Section 301.020. We feel that when the motor power is not used merely incidentally to propel the apparatus from one location to another it would be difficult to determine that the apparatus were designed primarily for use anywhere but on the highways.

Therefore, consistent with our previous opinions, and with the purposes of the motor vehicle registration act, we feel that trucks, even though their beds have been equipped with winches and used for loading and unloading logs, need to be registered in compliance with the provisions of Chapter 301.

CONCLUSION

It is the opinion of this office that trucks whose beds have been equipped with winches and used for loading and unloading logs, but which are driven on the highways from job to job, or driven to garages for repair, must be registered and licensed in compliance with Chapter 301, RSMo, Cumulative Supplement, 1957.

Sincerely yours,

John M. Dalton
Attorney General

Enclosure

JBS:lc/cm

COMPATIBILITY OF OFFICES: A person may file for both a county office
FILING FOR OFFICES: and for county committeeman on the same
ticket at the same time.



May 22, 1958

Honorable William C. Myers, Jr.
Prosecuting Attorney, Jasper County
917 West Daugherty
Webb City, Missouri

Dear Sir:

You recently requested an opinion of the following matter:

"The County Clerk of Jasper County has requested that I obtain a ruling from your office on the legality, in second class counties, of the same person filing both for a county office and for a county committeeman."

Your request does not state whether the person has filed for nomination in both races on the same ticket or whether the person has filed on one ticket for County Committeeman and on the other ticket for County office. A basic knowledge of politics makes the latter state of facts extremely unlikely. We, therefore, assume that the person has filed on one ticket for both offices.

The law in Missouri is settled that a man, absent statutory or constitutional provisions to the contrary, may hold more than one office providing the offices are compatible. See State ex rel. Walker v. Bus, 135 Mo. 326. We feel that, absent some statutory or constitutional provision, a man may file for more than one office at the same time. We have searched the law and find no statutory or constitutional provision prohibiting filing for more than one office at the same time on the same ticket. We call attention, however to Section 120.370, which reads, in part, as follows:

"No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot. All declaration papers shall be filed as follows:"

Honorable William C. Myers, Jr.

Some question arises as to the meaning of this section when it is considered in connection with the other statutory provisions governing filing. Section 120.340, RSMo 1949, requires that each candidate file a declaration of candidacy for office as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in Sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (. . .precinct of the town of), or (theprecinct of theward of the city of), or theprecinct oftownship of the county ofand state of Missouri, do announce myself a candidate for the office ofon theticket, to be voted for at the primary election to be held on the first Tuesday in August,and I further declare that if nominated and elected to such office I will qualify."

This declaration is the only written declaration required to be filed and the question arises as to whether the language "no person shall file more than one written declaration" should be held to literally prohibit more than one filing. We think such a holding would be improper.

Section 120.370, when read as a whole, indicates that the section is intended to prohibit filing more than one written declaration indicating the party designation under which a candidate's name is to appear on the ballot. In other words, a man must run as a Republican or a Democrat. He may not run as both a Democrat and a Republican at the same time on the same ticket. We feel that inasmuch as a man may

Honorable William C. Myers, Jr.

hold more than one office at a time in Missouri if the offices are compatible and, further, that inasmuch as there are now no constitutional or statutory provisions prohibiting filing for more than one office at the same time on the same ticket, that a person may properly file for both county office and county committeeman on the same ticket at the same time.

CONCLUSION

It is the opinion of this department that a person may file for both a county office and for county committeeman on the same ticket at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James E. Conway.

Yours very truly,

John M. Dalton
Attorney General

JEC:aw

COUNTY BOARD OF EQUALIZATION: It is the opinion of this department that in a county in which there is no county surveyor that the county board of equalization may nonetheless function.



June 27, 1958

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Section 138.010 R.S.Mo. 1949, provides for a county board of equalization consisting of certain county officers, including the county surveyor. Knox County does not have a county surveyor and apparently does not have any one qualified for the job who will take the same.

"I would like to have an opinion of your office as to whether or not a county board of equalization consisting of the county officers with the exception of a county surveyor is a legally constituted board to perform the duties of a county board of equalization?

"Since the board must meet the second Monday of July, your opinion would be appreciated as soon as possible."

Section 138.040, RSMo 1949, reads:

"1. The county board of equalization shall have power to compel the attendance of witnesses and the production

Honorable Charles E. Marrell, Jr.

of necessary papers and records in relation to any appeal before them, and it shall be the duty of the sheriff of the county to execute such process as may be issued to this end.

"2. A majority of said board shall constitute a quorum, and a majority of the members present shall determine all matters of appeal or revision."

It will be noted that numbered paragraph 2 holds that a majority of the board constitutes a quorum. This means that although the county surveyor was a member of the board, but never attended a meeting, that the board could transact its business without his presence. In the instant case the position on the board which would normally be filled by the county surveyor is vacant because there is no such officer in your county. The question to be determined is whether such vacancy nullifies or makes inoperative any action taken by the board of equalization.

Our research regarding this matter has not been as productive as we would desire. The only case which we have been able to find which bears upon this point is not strictly analogous. However, we do believe that it sets forth the principle of law which is applicable here. In the case of Bauer vs. School District, 78 Mo. App. 442, the Kansas City Court of Appeals was considering a situation in which the board of directors of a school district had issued a bond for \$600. At l.c. 444, the court stated:

"The first point made against the bond is that there was a vacancy in the board when the renewal bond was issued and that while said vacancy existed no business could be transacted by the board under the provisions of section 7991, Revised Statutes 1889. That section reads as follows: 'If a vacancy occur in the office of director, by death,

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resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county commissioner shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 7989, and shall serve until the next annual school meeting.'

"In our opinion a failure on the part of the directors to fill the vacancy as they are required to do by this statute, does not invalidate any official action taken by the board. The command of the statute is addressed to the remaining members of the board and no intention seems to be disclosed to make void any act done while the vacancy exists. If such had been the intention of the lawmakers on a matter so important, they would undoubtedly have expressed the intention in direct terms. The directors should obey the statute before performing any other official act. It may be that they could, by proper proceedings, taken in time, be compelled to do so. But if the board engages in its duties while the vacancy exists, the business transacted if otherwise regularly done, will not be void."

Honorable Charles E. Murrell, Jr.

We are further persuaded of the correctness of our position by the fact that numbered paragraph 2 of Section 138.040, supra, states that a majority of the board shall constitute a quorum. This carries the inference that a quorum may transact business, and we note the fact that such is the case.

We note also that a county board of equalization performs an extremely important function in the county; in your county the position of county surveyor is not and cannot be filled; if the absence of the surveyor from the board renders its actions a nullity and makes it inoperative then your county would be without a board of equalization, and we cannot believe that such is the intention of the law.

CONCLUSION

It is the opinion of this department that in a county in which there is no county surveyor that the county board of equalization may nonetheless function.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

hpw;mjb:lc

CUMULATIVE SENTENCES:
COMMITMENTS:
DEPARTMENT OF CORRECTIONS:
PAROLEES:

(1) The cumulative sentence provision of Section 222.020, RSMo 1949, is not applicable to a sentence followed by a commitment thereupon to the penitentiary, where such sentence was imposed upon a conviction for an offense committed by a parolee from the Intermediate Reformatory prior to the completion of said parole; (2) an amendment to Section 222.020 is necessary since under Section 5, House Bill No. 208, 69th General Assembly, there are no longer any sentences to the penitentiary.



January 9, 1958

Honorable E. V. Nash, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Nash:

This will acknowledge receipt of your opinion request of November 22, 1957, which reads as follows:

"The Sixty-Ninth General Assembly enacted and passed House Bill No. 208, particular attention directed to Section 6, paragraph 2, wherein all persons convicted in the State of Missouri were to be sentenced to the Department of Corrections. Final disposition of the individual as to whether or not they would be sent to the Intermediate Reformatory or the state penitentiary to be determined by a classification committee set up within the Department of Corrections.

"We are wondering what effect this will have upon an inmate presently under sentence at the Intermediate Reformatory who might be paroled and, while on parole and prior to the completion of the parole, would commit an offense and be sentenced to the State Penitentiary, as to whether or not this additional sentence would run consecutively or concurrent.

"Your attention is directed to the Supreme Court ruling in the Clarence Anthony alias Clarence County case, cause #38385, which has been the basis for action in past cases.

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"We are also interested as to whether or not it will be necessary to request an amendment to Section 222.020 to clarify this situation."

Our attention has been directed to Section 6, paragraph 2, House Bill No. 208, 69th General Assembly. This section reads as follows:

"2. The sheriff or other officer charged with the delivery of persons committed to the department of corrections for confinement in a correctional institution within the department shall deliver the person, together with all necessary papers, to the reception center and shall take from the director of the division of classification and assignment a certificate of delivery of the prisoner."

We believe, from the nature of the questions in the opinion request, that such questions have arisen as a result of Section 5, House Bill No. 208, 69th General Assembly, rather than Section 6, paragraph 2, supra, and, consequently, this opinion will be written accordingly. Said section reads as follows:

"Section 5. All commitments which under the law heretofore in force would have been made to the state penitentiary, Jefferson City, or to the Intermediate Reformatory, Cole County, shall hereafter be made to the department of corrections generally and the division of classification and assignment has full power to assign the committed person to any correctional institution or branch thereof within the department appropriate to his class."

The first question posed in the opinion request concerns the nature of a sentence, that is, whether it is cumulative or concurrent, when such sentence is imposed upon a parolee who has been paroled from the Intermediate Reformatory, the latter sentence being to the penitentiary, although the party was still under sentence to the Intermediate Reformatory. The determination of this question necessarily entails an interpretation of both Section 5, supra, and Section 222.020, RSMo 1949. The latter section reads as follows:

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"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held; provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

It is not clear from the opinion request whether the sentence to the Intermediate Reformatory was prior or subsequent to the effective date of Section 5, supra. In our view, however, as will be pointed out, it is immaterial.

The provision in Section 222.020, supra, requiring a sentence upon a conviction for an offense committed in this state by a convict under sentence, to begin at the expiration of the sentence under which the convict may be held, was interpreted in the case of Anthony v. Kaiser, 169 S.W.2d 47, as being applicable only to convicts who were under sentence to the penitentiary at the time of the commission of the second offense. It was held in said case that the provisions of this section were not applicable to a party who, at the time of the commission of the second offense, was under sentence to the Intermediate Reformatory. The court, in this case, further held that the rule that sentences to different institutions are cumulative and not concurrent, was not applicable in this situation for the reason that the Intermediate Reformatory and the penitentiary are not, in legal contemplation, different institutions.

If the sentence to the Intermediate Reformatory was prior to the effective date of Section 5, supra, then we believe that the Anthony case, supra, is controlling.

If, on the other hand, a party is placed in the Intermediate Reformatory under a conviction occurring subsequent to the

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effective date of Section 5, supra, then, in such case, the convict would not have been sentenced to the penitentiary; he would have been committed to the Department of Corrections under Section 5, supra, and, by it, placed in the reformatory. Consequently, unless a commitment to the Department of Corrections means the same as a sentence to the penitentiary, the cumulative sentence provision of Section 222.020 would not be applicable to a sentence imposed upon a conviction for an offense committed by a parolee from the Intermediate Reformatory for, as pointed out in the Anthony case, supra, such cumulative sentence provision is applicable only to convicts who were under sentence to the penitentiary. We believe that it is clear, upon its face, that a commitment to the Department of Corrections, as now required under Section 5, supra, is not the same as a sentence to the penitentiary for the reason that the two places are not one and the same. It appears, on the other hand, that the term "commitments" as used in Section 5, supra, means the same as sentences, it being stated by the court in State v. Harrison, 276 S.W.2, 222, 1.c. 226, that " * * * a commitment being, as required by statute, * * * but a certified copy of a judgment and sentence * * *."

You have further inquired "as to whether or not it will be necessary to request an amendment to Section 222.020 to clarify this situation." In view of the foregoing interpretation of Section 5, supra, and the ruling in the Anthony case, supra, we believe that such will be necessary. This for the reason that there will be no sentences to the penitentiary upon convictions occurring after the effective date of Section 5, supra, and, consequently, under the interpretation of Section 222.020, by the Anthony case, supra, the cumulative sentence provision of the latter section will not be applicable to any such convict who commits an offense while on parole from either the Intermediate Reformatory or the penitentiary.

CONCLUSION

It is the opinion of this office that: (1) the cumulative sentence provision of Section 222.020, RSMo 1949, is not applicable to a sentence followed by a commitment thereupon to the penitentiary, where such sentence was imposed upon a conviction for an offense committed by a parolee from the Intermediate Reformatory prior to the completion of said parole; (2) an amendment to Section 222.020 is necessary since under Section 5, House

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Bill No. 208, 69th General Assembly, there are no longer any sentences to the penitentiary.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

John M. Dalton
Attorney General

HLH:law

STATE HOSPITALS: Section 202.330, RSMo Cum. Supp. 1957, is applicable
PAY PATIENTS: to patients committed to state hospitals prior
CHARGES: to the effective date of the above statute; that
the Division of Mental Diseases may charge pay
patients in state hospitals the maximum amount fixed by the division
for each institution or any amount below that maximum based upon the
ability, or means of the patient, to pay. A husband is liable for
the support of his wife unless she has abandoned him without good
cause or has abandoned him with cause, and has contracted an adul-
terous relationship consequently; that a husband is liable for the
support of his minor children; that in the absence of the husband
or his inability to support minor children the same obligation
devolves upon the wife. Persons who adopt a child and persons
who stand in the position of in loco parentis have the same
duty to support as do natural parents.

June 18, 1958

Mrs. Ruth Nanson, Executive Secretary
Division of Mental Diseases
State Office Building
Jefferson City, Missouri



Dear Mrs. Nanson:

In a letter to me under date of March 27, 1958, you direct
my attention to Section 202.330, RSMo Cumulative Supplement,
1957, and then ask three questions relating to the above section.

The first of these questions is: "Can the above named
statute be applied to patients committed prior to the effective
date of the statute, or is the statute applicable only to
patients admitted after this law is effective?"

Section 202.330, supra, to which you refer, was enacted
by the 69th General Assembly, became effective August 29, 1957,
and reads:

"In determining the amount necessary to be
charged for the support of pay patients, the
director of the division of mental diseases
is authorized to determine the maximum amount
per month that may be charged in each of the
five state hospitals, and the St. Louis train-
ing school and the Missouri state school. The
maximum charge shall be related to the per
capita cost of each institution which may vary
from one locality to another. The director
shall also determine a standard means test
which will be applied to all institutions
under the division."

Mrs. Ruth Nanson

Subsequent to writing the above letter, you have orally informed us that the situation which you contemplate is one in which, prior to August 29, 1957, a pay patient has been admitted to a Missouri state hospital upon the basis of \$50 per month payment. Under the authority of Section 202.330, supra, the Director of the Division of Mental Diseases will determine, let us say for example, that the maximum which can be charged for a pay patient is \$75 per month. Can the pay patient who was admitted prior to August 29, 1957, be required to pay this maximum or, at any rate, more than \$50 per month? The only possible theory upon which it could be held that the pay patient could not be required to pay more than the amount which he had been paying prior to August 29, 1957, would be that when he was admitted to the hospital he entered into a contract with the hospital by which the hospital contracted to keep and maintain the patient for an indefinite time for a certain amount of money.

We do not believe that there is any indication that there was in any of the pay-patient cases any such contract.

There is nothing in the procedure set forth in regard to the admission of pay patients to a state hospital which would indicate the contractual relationship. Numbered paragraphs 1 and 2 of Section 202.863, RSMo Cumulative Supplement 1957, read:

"1. Patients admitted to the state hospitals under the provisions of this law shall be classified as private patients or as county patients.

"2. When admission is sought for any person as a private patient, payment for care and treatment shall be made to the business manager of the hospital for thirty days in advance and a bond executed in sufficient amount to secure the payment for such care and treatment. No part of the advance payment shall be refunded if the patient is taken away within such period uncured and against the advice of the superintendent."

Section 202.867, sets forth the form of the bond referred to in numbered paragraph 2 of Section 202.863, supra. Because of its length we shall not set this forth in full. The bond is to be signed by those persons who bind themselves as obligors for the care and treatment of the person admitted as a pay patient. We do not find anything in such bond that could possibly be construed as being a contract.

Mrs. Ruth Nanson

We do not believe that the statute providing for the admission of a pay patient is intended to, or does, set up a contract by the patient and the state. In the case of *Dodge vs. Board of Education*, 302 U.S. 74, at l.c. 78, the United States Supreme Court stated:

"In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employe of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right."

In the case of *Wisconsin and Michigan Railway Co. v. Powers*, 191 U.S. 379, at l.c. 387, the United States Supreme Court stated:

"But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious

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and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, * * *

We believe it to be clear that under the law as set forth in the two preceding cases, no contract was ever entered into in the instant situation. We agree with the language of the court in the Dodge case, particularly, when it states that statutory law simply declares a policy which is to be followed until the Legislature shall ordain otherwise.

In the case of the City of St. Louis vs. Cavanaugh, 207 S.W.2d 449, at l.c. 454-455, the Supreme Court of Missouri stated:

"The power to repeal the ordinances providing for a free bridge was but an incident to the power to enact them. Kansas City v. White, 69 Mo. 26; 37 Am. Jur. 834, Municipal Corps., Sec. 197. The members of the Board of Aldermen could not bind their successors in office with reference to the matter of tolls or no tolls. 50 Am. Jur. 62, Statutes, Sec. 45. In addition, the respondent had no vested right to have the ordinances remain in force and effect. * * * (Emphasis ours.)"

Your second question is: "Whether under Section 202.330, supra, after the maximum amount is established for each institution in accordance with the per capita cost, can the Division of Mental Diseases charge an amount less than the maximum amount based upon the patient's ability to pay?" Thus, one might be charged \$75 a month; another \$60; another \$50; and other amounts below this.

A determination of this question, of course, involves a construction of Section 202.330, supra, quoted above. We believe that some light is thrown on that construction by reference to the section which it repealed, which was Section 202.330 RSMo 1949. That section reads:

"In determining the amount necessary to be charged for the support of pay patients, the five state hospitals shall be considered as a unit in determining the cost for the support of insane patients, and each of the other institutions managed by the division of mental diseases shall be considered separately in determining the amount to be charged for the support of patients in such institutions."

Mrs. Ruth Nanson

We note that the above section does not use the word "maximum" as does the present section but refers only to the "amount necessary to be charged for the support of pay patients." Some meaning therefore must be given to the word "maximum." It would seem clear that it was the intent that no more than a certain amount should be charged any pay patient, but that a lesser amount could be charged. This thought is furthered by the final sentence in the section which is that: "The director shall also determine a standard means test which will be applied to all institutions under the division." The use of the word "means" can, we believe, have only one meaning and that is, ability to pay. Such is the meaning of the word given in the case of Moore v. State Social Security Commission, 122 S.W. 2d 391. At 1.c. 394, the Kansas City Court of Appeals stated:

"Though claimant is incapacitated from earning a livelihood the question remains, has he income or resources sufficient to maintain him in decency and health? If the answer is yes, then he has adequate means of support. If the answer is no, then he does not have adequate means of support.

"The word 'resources' has thus been defined: 'Money or any property that can be converted into supplies; means of raising money or supplies; available means or capability of any kind.' 54 C.J. 723.

"The word 'means', when used in reference to property, signifies 'Estate; income; money; property; resources.' 40 C.J. 18. The New Century Dictionary defines 'Means' as 'disposable resources.'

"The words resources, income and means refer to property or capabilities of producing property and do not include gifts which may or may not be made at some future time.

"No court or law writer, so far as our research has disclosed, has ever said that an indigent person whose only support is contributions made by one who is not under

Mrs. Ruth Nanson

legal duty to make them, has resources, means or means of support. The law recognizes and enforces rights which are legal and none other."

Other cases of similar import could be cited. However, since the above is the only possible construction which could be placed upon the word "means" as it is used in Section 202.330, supra, it follows that the word must have reference to the ability to pay of each individual pay patient because if it does not mean this then the last sentence of the section means absolutely nothing and it is a standard rule of statutory construction that meaning must be given, if possible, to all parts of a statute.

That such was the intent of the legislature is, we believe, demonstrated by the fact that prior to the re-enactment of Section 202.330 by House Bill No. 446 in the 1957 General Assembly, a bill which was introduced by Representative Simcoe of Callaway County, the legislature received recommended legislative changes from the superintendents of the five state hospitals. We here quote from that recommendation as supplied to us by the Legislative Research Committee:

"202.330

The Problem

"At present the following situation has developed in the handling of charges in the five state hospitals. The St. Louis State Hospital arranges for charges for private care in terms of the patient's ability to pay, thus charges may vary from \$10 to \$120 per month. In the other four hospitals private care patients pay a fixed fee of \$50 per month. This fee is fixed whether a person can afford either more or less. It is conceivable that some patients may be able to afford some sum less than the \$50 a month, thus additional revenue to the state is lost. Also the fact that one hospital functions according to one policy and the other four hospitals according to another appears to be not in keeping with 202.330.

Mrs. Ruth Nanson

Recommendation

"202.330

"In determining the amount necessary to be charged for the support of pay patients, the director of the division of mental diseases, is authorized to determine the maximum amount per month that may be charged in each of the five state hospitals, and the St. Louis Training School and the Missouri State School. The maximum charge shall be related to the per capita cost of each institution which may vary from one locality to another. The director shall also determine a standard means test which will be applied to all institutions under the division."

It will be noted that it was the obvious intention of the superintendents who drew the proposed bill, which was adopted by the legislature, that the director be given the power to fix the amount that each pay patient should pay, based on his ability to pay, in whatever amount that ability might be up to a previously determined maximum.

Since this was the obvious intention of the persons who drew the bill which was adopted by the legislature, it can reasonably be inferred that this was also the legislative intent.

We believe, therefore, that the Director of the Division of Mental Diseases may charge an amount less than the maximum amount set for each state institution based upon the ability of each individual pay patient in that institution to pay.

Your final question is: "What relatives would be legally responsible to pay for a patient's care?"

In response to this question, we would point out that it is the duty of a husband to support his wife and minor children. In the case of Greer vs. McCrory, 192 S.W. 2d 431, at l.c. 442, the Missouri Supreme Court stated:

" * * * The home and family form such a vital part of society itself and is so essential to public welfare that the law of the land imposes upon the husband the

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duty, in so far as he is reasonably able to do so, to provide a home for and to support his wife and family. * * *

In the case of Broadbuss vs. Broadbuss, 221 S.W. 804, at 1.c. 304, the Kansas City Court of Appeals stated:

" * * * Under the common law as well as by statute the husband is bound to furnish reasonable support for his wife and minor children. Youngs v. Youngs, 78 Mo. App. 225. * * *"

In the case of Bitzenburg v. Bitzenburg, 226 S.W. 2d 1017, at 1.c. 1023, the Missouri Supreme Court stated:

" * * * The obligation of a husband to support his wife becomes complete at the time of their marriage, and the obligations of a father to support his child is complete when the child is born. Pickel v. Pickel, 243 Mo. 641, 662, 147 S.W. 1059."

Numerous other cases making the same holding could be adduced. This duty upon the father to support the child is until the child attains its majority.

In the case of Thomas v. Thomas, 238 S.W. 2d 454, at 1.c. 455, the Kansas City Court of Appeals stated:

"The defendant appealed, and urges that the court erred in sustaining plaintiff's motion because it is the primary duty of a father to furnish support for a child until said child attains his majority, 'absent a change of condition.' That is a correct statement of a general principle of law, * * *."

In the case of Thompson vs. Perr, 238 S.W. 2d 22, at 1.c. 25, the Missouri Supreme Court stated:

"A father's liability to a third person for necessities furnished his minor child is not affected by the fact that the custody of the child has been awarded to the mother. But in any event his liability is founded upon the

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theory of authorization; and in the absence of an express promise to pay, there must be a showing of circumstances from which a promise may be implied.

"[4-6] Except for an emergency which renders a third person's immediate interference both reasonable and proper, an implied promise to pay for necessities must depend upon the father's failure or refusal to supply them; and where he is ready and willing to make suitable provision for his child, there can be no recovery by a third person who has furnished the necessities without his express authority. In other words, the basis of the father's liability is his omission to fulfill his obligation of supporting his child; and a stranger who furnishes articles or renders services to the child does so at the peril of being able to show that they were furnished under such circumstances as to have imposed a duty on the father to pay for them. * * *"

In the case of *Schwieler vs. Heathman's Estate*, 264 S.W. 2d 932, at l.c. 933, the St. Louis Court of Appeals stated:

" * * * The appellant asserts that the natural father has the primary obligation to support his minor child and that others furnishing the child with necessities may recover from the father. This, as a general proposition, is the well-established law. *Winner v. Schucart*, 202 Mo. App. 176, 215 S.W. 905; *McCloskey v. St. Louis Union Trust Co.*, 202 Mo. App. 28, 213 S.W. 538; *Kelly v. Kelly*, 329 Mo. 992, 47 S.W. 2d 762, 81 A.L.R. 875. * * *"

As to the obligation of the husband to support the wife, discussed above, there are exceptions. In the case of *Hess v. Hess*, 113 S.W. 2d 139, l.c. 142, the Missouri Supreme Court stated:

"Moreover, by the decree in the former suit, the plaintiff herein stands convicted of having abandoned and left her husband and of having absented herself from him without any reasonable

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cause for so doing; and it follows that he was under no obligation to support her so long as she did not return to him."

In the case of Webster vs. Boyle-Pryor Const. Co., 144 S.W. 2d 828, at l.c. 829, the Kansas City Court of Appeals held:

"While the evidence tends to show that deceased was guilty of such conduct as to justify claimant in leaving him, in that he cursed, struck and abused her, yet it is well established that where a wife leaves her husband, even for a justifiable cause, and subsequently lives in open adultery, she thereby forfeits her right to support from him. 30 C. J. pp. 519, 597; 27 A.J.P. pp. 17, 18; 26 A.J.P. pp. 939, 962, 963. * * *"

Thus, it will be seen that when a wife leaves her husband without cause she is not entitled to support from him and that when she leaves her husband with cause and later enters into an adulterous relationship she is not entitled to receive support.

The cases above have stated that it is the primary duty of the father to support the child. When the father is not available to do this and cannot be made to do it, then the duty devolves upon the mother. In the case of State vs. Hall, 257 S.W. 1047, at l.c. 1055, the Missouri Supreme Court stated:

" * * * It is the duty of the father in the first instance to care for and support his children, and if for any reason that duty of his is abrogated, then it becomes the duty of the mother to care for and support them. * * *"

In the case of Girls' Industrial Home vs. Fritchey, 10 Mo. App. 344, at l.c. 347, the St. Louis Court of Appeals held:

" * * * The mother is the head of the family when the father is dead. She has the same control over the minor children as he had, and we see no reason why her duties to them should not be the same. The English policy on the subject is declared by the statute of 43 Eliz., c. 2, which provides that the father and mother of poor persons shall maintain them

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at their own charges, if of sufficient ability. Nor do we know any reason or authority for the position assumed by counsel for defendant, that the position of a widowed mother towards her children is not in all respects that of a father, as to every obligation towards them."

In the case of *Mauerman v. The St. Louis, I.M. & S. Ry. Co.*, 41 Mo. App. 348, 1.c. 359, the St. Louis Court of Appeals stated:

" * * * Under the decisions of this court in *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344, and *Matthews v. Railroad*, 26 Mo. App. 75, the mother on the death of the father succeeds to the duties and obligations of her husband touching minor children. * * *"

We nowhere find any obligation imposed upon a wife for the support of her husband.

It, of course, goes without saying that persons who adopt a child stand in the same relation to the child from the standpoint of being liable for its support as do the natural parents.

The same principle of law applies to those relatives who stand in a position of *in loco parentis* to a child.

In the case of *Dix vs. Martin*, 171 Mo. App. 266, at 1.c. 272, the Kansas City Court of Appeals stated:

" * * * We recognize the rule that where a person assumes towards a child not his own a parental character, holds the child out to the world as a member of his family towards whom he owes the discharge of parental duties, he stands in loco parentis to the child and his liability is measured by that of the relationship he thus chooses to assume. [*Academy v. Bobb*, 52 Mo. 357; *Eickhoff v. Railway*, 106 Mo. App. 541, 19 Am. & Eng. Ency. of Law, 518]."

In the case of *State vs. Macon*, 186 S.W. 1157, at 1.c. 1159, the Springfield Court of Appeals stated:

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"[1] As before stated, the relator was the stepdaughter of the guardian at the time of his appointment and was then living with him and her mother as a member of his family. This we think admits of no doubt whatever under the undisputed facts. While the question of whether a particular person is or is not a member of a family is at times a mixed question of law and fact, yet on the conceded facts here the law so pronounces. While the law does not require that a stepfather take into his family as members thereof his stepchildren and stand in loco parentis with reference to them, yet when he does so receive them and holds them out to the world as members of his family, he incurs the same liability as to his own children, and, the relationship being established, the reciprocal rights and duties attach. State v. Kavanaugh, 133 Mo. 452, 460, 33 S.W. 842; St. Ferdinand Loretto Academy v. Bobb, 52 Mo. 357, 360; Dix v. Martin, 171 Mo. App. 266, 272, 157 S.W. 133."

In the case of In re Tucker, 74 Mo. App. 331, at l.c. 337, the St. Louis Court of Appeals stated:

" * * * It is well settled by the decisions in this state that if the claimant for an allowance for the support of a minor stands in the position of loco parentis and the minor has been reared as a member of the family, the allowance will not be made unless there was an intention or purpose formed at the time to make such a charge. State ex rel. v. Slevin, 93 Mo. 253; State ex rel. v. Miller, 44 Mo. App. 118; Folger v. Heidel, 60 Mo. 287; Guion v. Guion, 16 Mo. 48; Gillett v. Camp, 27 Mo. 541; Otte v. Becton, 55 Mo. 99. * * *"

In the case of Horsman vs. U. S., 68 Fed. Supp. 522, the District Court for the Western District of Missouri stated:

" * * * The plaintiffs actually assumed the obligations incident to the parental relations without at the same time going through the formalities necessary to a legal adoption. This is precisely what is meant by in loco

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parentis. 32 Words & Phrases Permanent Edition, p. 415; 46 C.J. §174, p. 1334; Miller v. United States, 8 Cir., 123 F. 2d 715, loc. cit. 717."

In the case of Meisner vs. U. S., 295 Fed. 866, at l.c. 868, the United States District Court for Western Missouri stated:

"[2,3] Plaintiff claims that under all the facts agreed upon Mr. and Mrs. Grafke stood in loco parentis to Robert R. Parks, and that she was a sister under the definition set forth in section 5a. The government contests this interpretation of the act. The deceased soldier, having no known relatives of the blood, out of affection designated the plaintiff as the beneficiary in his policy of insurance. It is the policy of the courts, if possible, to effectuate the expressed wishes of a deceased soldier. Practically the sole question presented is whether Mr. and Mrs. Henry Grafke, under the agreed facts, stood in loco parentis to the soldier. If they did, the plaintiff is a sister within the definition laid down in section 5a, and may recover. Our attention is invited to the established rule of construction that Congress, in the employment of terms, used them in their accepted legal sense and in accordance with common understanding. We are also reminded that courts at all times in interpretation seek to carry out the spirit and purpose of legislation.

"'A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption. The assumption of the relation is a question of intention.' 29 Cyc. 1670.

"In Black's Law Dictionary, p. 604, the following definition is given:

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"'In the place of a parent; instead of a parent; charged, fictitiously, with a parent's rights, duties and responsibilities.'

"In re Estate of David Moran, 151 Mo. 555, 52 S.W. 377, the Supreme Court of Missouri holds that:

"'The law places no limit upon the age of the child to be adopted. So that where the child is 22 years of age at the time of his adoption, he is just as capable of taking by inheritance as one 19 years of age adopted by the same instrument.'

From the above it will be seen, as we noted before, that those relatives who stand in a position of in loco parentis, in a manner, are under the same obligation to support as are natural parents. The answer given above is limited to the duty of relatives to support in the absence of contract to do so.

CONCLUSION

It is the opinion of this department that Section 202.330, RSMo Cumulative Supplement 1957, is applicable to patients committed to state hospitals prior to the effective date of the above statute; that the Division of Mental Diseases may charge pay patients in state hospitals the maximum amount fixed by the Division for each institution or any amount below that maximum based upon the ability, or means, of the patient to pay.

It is the further opinion of this department that a husband is liable for the support of his wife unless she has abandoned him without good cause or has abandoned him with cause, and has contracted an adulterous relationship consequently; that a husband is liable for the support of his minor children; that in the absence of the husband or his inability to support minor children the same obligation devolves upon the wife; and that persons who adopt a child and persons who stand in the position of in loco parentis have the same duty to support as do natural parents.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:mw;gMcK;ml

STATE ANATOMICAL BOARD:
DECEASED BODIES, CONTROL OF:

Body required to be buried at
public expense is under control
and custody of Missouri State
Anatomical Board.



April 30, 1958

Dr. M. D. Overholser
Secretary, Missouri State
Anatomical Board
University of Missouri Medical Center
Columbia, Missouri

Dear Dr. Overholser:

We are in receipt of your request of February 27, 1958,
for an official opinion of this department, which reads, in
part, as follows:

"Due to the pressure of the undertakers
in certain counties the County Courts
are continuing to authorize allowances
for burials of bodies required to be
buried at public expense. This proce-
dure is in conflict with our State
Anatomical Law. If there is a Statute
permitting the County Courts to do this,
the Missouri State Anatomical Board
respectfully requests a ruling from you
as to which Statute has precedence."

We direct to your attention paragraph 1 of Section 194.150,
RSMo 1949, and Section 194.170, RSMo 1949, as follows:

Section 194.150.

"1. Superintendents or wardens of
penitentiaries, houses of correction
and bridewells, hospitals, insane
asylums and poorhouses, and coroners,
sheriffs, jailers, city and county
undertakers, and all other state,
county, town or city officers having

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the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the board, or the person duly designated by the board or by its secretary to receive such notice, whenever any such body or bodies come into his or their custody, charge or control, and shall, without fee or reward, deliver, within a period not to exceed thirty-six hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the board and permit the board or its agent or agents to take and remove all such bodies, or otherwise dispose of them; provided, that each educational institution receiving a body from the board shall hold such body for at least thirty days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expenses of such interment."

Section 194.170.

"Bodies required to be buried at public expense shall be under the exclusive custody and control of the board. It is hereby declared unlawful for any person or persons to hold any autopsy on any dead human body subject to the provisions of sections 194.120 to 194.180 without first having obtained the consent of the secretary of the board or his accredited agent. The consent of any person for an autopsy on his or her body shall not in any way prevent or affect the application of sections 194.120 to 194.180."

We also direct your attention to the case of State ex rel. Holladay v. Rinke, 121 SW 159 (1909), which asserts that a new statute is amendatory, and repeals an old one by implication only to the extent of the irreconcilable repugnancy between the two.

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It would appear that with the passage of Sections 194.150 and 194.170, supra, the legislature intended that all bodies to be buried at public expense are under the complete control and jurisdiction of the Missouri State Anatomical Board, and the only manner in which a body to be buried at public expense may be taken from the control and jurisdiction of the Anatomical Board is for arrangements to be made by a friend or relative to bury the body at his own personal expense.

Sections 194.170 and 194.150, supra, were enacted in 1939, subsequent to the enactment of Section 205.630, RSMo 1949, which states:

"The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses."

We believe that to the extent that this section is inconsistent with the above sections of the anatomical law Section 205.630 is repealed, applying the principles of *Holladay v. Rinke*. If no relative or friend of any deceased person is willing to pay the expense of interment of any dead body, then that body is a body required to be buried at public expense and is automatically under the exclusive custody and control of the Missouri State Anatomical Board.

CONCLUSION

If no relative or friend of any deceased person in the hands of the agents and institutions listed in Section 194.150, RSMo 1949, is willing to pay the expense of interment of that deceased person, then that body is a body required to be buried at public expense and is automatically under the exclusive custody and control of the Missouri State Anatomical Board.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:om;ml

OFFICE OF RECORDER: There is no minimum age requirement for a deputy recorder of deeds in a third-class county in which the office of recorder and circuit clerk are separate. There is no minimum age requirement required for a person to sign the margin of record as the assignee of the beneficiary in connection with a trust deed release.



July 23, 1958

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Honorable Richard King, Recorder of Deeds, Jefferson County, has asked that I request an official opinion from you concerning the following problems:

"1. What is the minimum required age for a person to sign the margin of record as assignee of the beneficiary in connection with a trust deed release?

"2. What is the minimum required age of a Deputy Recorder of Deeds?"

We will consider your second question first. In regard to it, we direct attention to Section 59.250, MoRS Cum. Supp. 1957, which reads:

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 59.365 and four thousand dollars for other

Honorable W. H. S. O'Brien

duties imposed by law, shall be paid into the county treasury after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary." (Emphasis ours.)

Nowhere in the statutes, except as in the above, is any reference made to deputies for recorders in third-class counties, in which the office of circuit clerk and recorder are separate, as they are in Jefferson County. We assume that Jefferson County is the subject of your inquiry.

It will be noted that Section 59.250, supra, does not confer upon the recorder power to appoint deputies and assistants, but it does assume that the recorder does have such authority, i.e., "after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary."

In this regard, we note the case of Small v. Field, 102 Mo. 104. At l.c. 118, et seq., the Missouri Supreme Court stated:

"And it is also said by the appealing defendants that no provision is anywhere to be found in those statutes for the appointment of a deputy for a territorial district court. But at common law a ministerial officer had authority to appoint a deputy. Com. Dig.--Tit. Officer (D.I.); Am. & Eng. Cyclop. of Law--Tit. Deputy, 624. Thus, a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. 7 Bac. Ab.--Tit. Offices & Officers, 316 (L.).

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317,--Tit. Offices and Officers. * * *

Your question is as to the minimum age of the deputy referred to in Section 59.250, supra. No indication as to this matter is given in the aforesaid section.

Honorable W. H. S. O'Brien

On June 5, 1953, this department rendered an opinion, a copy of which is enclosed, to J. B. Schnapp, Prosecuting Attorney of Madison County, in which we held that there was no minimum age requirement for a deputy county clerk in a county of the fourth class.

We believe, because of the similarity in the fact situations, that the reasoning in that opinion would apply in the case of the recorder, and that there is no minimum age requirement for a deputy in that office.

Your first question is: "What is the minimum required age for a person to sign the margin of record as assignee of the beneficiary in connection with a trust deed release." In this regard we note numbered paragraph 1 of Section 443.060, RSMo 1949, which reads:

"1. If any mortgage, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided."

We also note Section 442.080, RSMo 1949, which reads:

"All deeds, mortgages, deeds of trust and other instruments affecting title to real estate hereafter executed by any minor shall be binding upon such minor unless he shall

Honorable W. H. S. O'Brien

file a deed or other instrument duly acknowledged in the office of the recorder of deeds where the land is situate, disaffirming the same, within two years after the disability of the minority is removed."

In this connection, we note the case of Hamlin v. Hawkins, 61 SW2d 348, in which case the Missouri Supreme Court at l.c. 350 (3-5) stated:

"It is proposed, and must be conceded, that the initial note and its security were, under the statute relating to minors (R.S. 1919 §2218 [Mo. St. Ann. §3059]), subject to disaffirmance by the minor within two years after attaining his majority, and that upon such disaffirmance those instruments were rescinded and annulled ab initio. 31 C.J. 1019; Craig v. Van Bebber, 100 Mo. 584, 13 S.W. 906, 18 Am. St. Rep. 569. Yet, down to the time of their avoidance, the instruments were merely voidable, not void. Shipley v. Bunn, 125 Mo. 445, 28 S.W. 754; Robinson v. Allison, 192 Mo. 366, 91 S.W. 115. It inevitably follows, as contended by appellant, that the trustee's deed to Shelton was without effect upon the title to the land."

From the above, we conclude that there is no minimum age requirement for a person to take the action contemplated by your first question.

CONCLUSION

It is the opinion of this office that there is no minimum age requirement for a deputy recorder of deeds in a third-class county in which the office of recorder and circuit clerk are separate.

It is the further opinion of this department that there is no minimum age required for a person to sign the margin of record as the assignee of the beneficiary in connection with a trust deed release.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:ld;gm
Encl. - Opinion to
Hon. J. B. Schnapp

LIBRARIES: (1) City of less than five thousand, with free public
CITY: library established and maintained by mill tax levied
COUNTY: under authority of Sec. 182.160, RSMo 1949, prior to
effective date of Sec. 182.140, RSMo Cum. Supp. 1955,
on August 29, 1955, may continue operation of library after repeal
of section, but could not levy a tax until enactment of House Bill
253, 69th General Assembly. (2) City of less than five thousand,
which established and maintained free public library under provi-
sions of Sec. 182.160, RSMo 1949, prior to effective date of Sec.
182.140, RSMo Cum. Supp. 1955, on August 29, 1955, may, under pro-
visions of House Bill 253, 69th General Assembly, levy a library
tax at the rate and in the manner authorized by Sec. 182.140, RSMo
Cum. Supp. 1955. (3) Residents of city of less than five thousand,
whose public library was established under authority of Sec. 182.160,
RSMo 1949, prior to the effective date of Sec. 182.140, RSMo Cum. Supp.
1955, on August 29, 1955, and still in operation, are ineligible to
sign a petition for a proposed county library under provisions of
Sec. 182.010, RSMo Cum. Supp. 1957.

February 4, 1958

Honorable Paxton B. Price
Librarian
Missouri State Library
Jefferson City, Missouri

Dear Mr. Price:

This department is in receipt of your request for a legal
opinion, which reads as follows:

"This office would appreciate receiving a formal
opinion from your office on the following
questions:

"1. Do the current statutes authorize cities
of less than 5,000 population to currently
operate public libraries that were in exist-
ence prior to January 1, 1955 and which were
established and maintained in the manner
specifically provided in Section 182.160,
RSMo. 1949?

"2. Can a city of less than 5,000 population hav-
ing a public library established and operated prior
to January 1, 1955 in the manner specifically pro-
vided in Section 182.160 RSMo. 1949, now raise its
library tax rate from one-half mill to one mill,
and under which statutory authority?

"3. For the purposes of interpreting the provi-
sion contained in Section 182.010, RSMo. 1955
Supplement pertaining to the residence of peti-
tioners, would the residents of a city of less

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than 5,000 population which has a library established and operated prior to January 1, 1955 under the authority specifically provided in Section 182.160, RSMo. 1949, be eligible to petition for a county library district and its support, excepting as provided in Section 182.030?"

Sections 182.140 and 182.160, RSMo 1949, and Section 182.140, RSMo Cum. Supp. 1955, are referred to in your letter.

Section 182.140, RSMo 1949, reads as follows:

"When one hundred taxpaying voters of any incorporated city shall petition the mayor and common council asking that an annual tax be levied for the establishment and maintenance of a free public library in such incorporated city, and shall specify in their petition a rate of taxation, not to exceed two mills on the dollar annually, and in cities of over one hundred thousand inhabitants not to exceed two-fifths of one mill annually on all the taxable property in the city, such mayor and common council shall direct the proper officer to give notice in his next legal notice of the annual election, or special election, which may be called for the purpose of voting on such question, that at such election every voter may vote.

'For a ____ mill tax for a free public library,'

or

'Against a ____ mill tax for a free public library,'

specifying in such notice the rate of taxation mentioned in said petition; and if the majority of votes cast on such proposition shall be 'for the tax for the free public library,' the tax specified in such notice shall be levied and collected in like manner with other general taxes of such incorporated city, and shall be known as 'The Library Fund;' provided, that such tax shall cease in case the legal voters of any such incorporated city shall so determine by a majority vote at any annual election held therein."

Section 182.160, RSMo 1949, reads as follows:

"The mayor and council, board of aldermen or board of trustees, of any city having a popula-

tion of less than twenty-five thousand, however organized and irrespective of its form of government, may levy a tax of not more than one-half mill on each one dollar of the assessed valuation on all property in said city, for the establishment and maintenance of a free public library in such incorporated city."

House Bill 261 of the 68th General Assembly relates to city libraries and became effective on August 29, 1955. This bill repealed certain sections of Chapter 182, RSMo 1949, and Cumulative Supplement 1955, and enacted fourteen new sections in lieu thereof. Among the repealed sections were Sections 182.140 and 182.160, RSMo 1949. A new section was enacted in lieu of the former one, which is now Section 182.140, RSMo Cum. Supp. 1957, but no new section has been enacted in place of Section 182.160 supra.

After the repeal of Section 182.160, supra, the mayor and council of a city of less than five thousand inhabitants or of any other city of a population less than twenty-five thousand inhabitants, was no longer authorized to establish and maintain a free public library, and to levy and collect a tax for the library at the rate and in the manner provided by said section. No new libraries could be established thereafter, in accordance with the provisions of said section, nor could the tax be levied and collected for the support of the library. However, House Bill 261 or the provisions of any other law do not provide that upon the repeal of Section 182.160, supra, all libraries organized and existing by virtue of this section should cease to exist. In the absence of any such statutory prohibitions, it appears to be the legislative intent that the existence of said libraries was to continue.

Apparently, to afford a means by which cities having less than five thousand inhabitants might levy and collect a tax for the support of their libraries, the 69th General Assembly enacted House Bill 253, which became effective from and after its passage and approval on June 18, 1957. The bill consists of sections 1 and 2. Section 1 is now designated as Section 182.145, RSMo 1957. Inasmuch as the purpose for enacting the bill is stated in Section 2, we quote the bill in its entirety.

"Section 1. Any incorporated city having lawfully established a free public library prior to the effective date of Section 182.140, RSMo 1955 Supp., and having had at that time authority to levy and collect a tax for the establishment and maintenance of the library, may levy and collect a tax for the maintenance of the library, and reduce or increase the tax in the manner provided in section 182.140, RSMo 1955 Supp.

"Section 2. Because at present there is no provision in the statutes whereby incorporated cities with a population of less than five thousand, may levy and collect taxes for the establishment of libraries or for the maintenance of libraries established prior to the effective date of section 182.140, RSMo 1955 Supp., and since it is necessary to provide such taxing authority in order to prevent the closing of many city libraries, this act is necessary for the immediate preservation of the public peace, health and safety and an emergency exists within the meaning of the constitution and this act shall be in full force and effect from and after its passage and approval."

It will be recalled that Section 182.160, supra, empowered the mayor and council of any city under twenty-five thousand to establish and maintain a public library from a tax levied for that purpose, at not to exceed the rate of one-half mill on each dollar assessed valuation annually.

For reasons given above, we have stated that after the repeal of this section, the power to maintain such libraries from the tax authorized by this section ceased, although the libraries' existence did not cease.

It appears that Section 1 of House Bill 253 is also applicable to cities of less than five thousand inhabitants which had libraries prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, and at that time had power to levy and collect a library tax. Said section grants power to such cities to levy and collect a tax to maintain their library in the manner provided by Section 182.140, RSMo Cum. Supp. 1955. It is observed the word "maintain" appears in said section. This is for the apparent reason that after the repeal of Section 182.160, supra, no new libraries could be established under authority of said section and it was only necessary to levy a tax to maintain those already established by virtue of such section. All of the inquiries of the opinion request refer to cities having a population of less than five thousand, which had established and maintained public libraries in accordance with Section 182.160, supra, and whose libraries were in existence prior to January 1, 1955. We are uninformed as to what, if any, particular significance is attached to this date by the writer of the opinion request, but in the event such date was given for the reason it was believed to be the effective date of Section 182.140, RSMo Cum. Supp. 1955, then the reasoning is incorrect, since the section became effective on August 29, 1955, and not on the earlier date mentioned. For the purpose of our discussion, it will be assumed the writer of the opinion request intended to refer to the date Section 182.140, RSMo Cum. Supp. 1955, became effective.

Honorable Paxton B. Price

In answer to the first inquiry, it is our thought a city of less than five thousand inhabitants, which had established and maintained a free public library from a tax levied for that purpose by the city council, under authority of Section 182.160, RSMo 1949, and prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, on August 29, 1955; that after the repeal of Section 182.160, RSMo 1949, such city could lawfully continue the operation of its public library, but no tax could be levied until the enactment of House Bill 253.

As previously stated, House Bill 253, supra, permits cities of less than five thousand inhabitants, which had established public libraries prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, to levy and collect taxes for the maintenance of their libraries, in the manner provided therein. The section provides a library tax rate limit for cities of less than five thousand inhabitants of two mills on the dollar annually, and one mill on the dollar annually for cities having over six hundred thousand inhabitants, but in either instance, the tax rate must be authorized by a majority vote of the qualified electors at the annual or special election held for that purpose.

In answer to your second inquiry, it is our thought that a city having a population of less than five thousand inhabitants, which had established and maintained a free public library under provisions of Section 182.160, supra, prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, may, under provisions of House Bill 253, 69th General Assembly, levy a library tax at the rate and in the manner authorized by Section 182.140, RSMo Cum Supp. 1955.

We understand the third inquiry to ask if the residents of a city of less than five thousand inhabitants, in which a library has been established under authority of Section 182.160, RSMo 1949, prior to August 29, 1955 (the effective date of Section 182.140, RSMo Cum. Supp. 1955) would be eligible to petition for a county library district under provisions of Section 182.010, RSMo Cum. Supp. 1957. Said section contains the statutory procedure for petitioning the county court to call an election to vote upon the proposition as to whether or not a county library district outside of municipalities having free public libraries, shall be established, and for the levying of an annual mill tax to support said library, and reads as follows:

"1. Whenever qualified electors equal to five per cent of the total vote cast for governor at the last election in any county, outside of the territory of all cities and towns in the county which at the time of election as hereinafter provided maintain and control free public and tax supported libraries pursuant to other provisions of this chapter except as provided in section 182.030 shall petition in writing the county court, asking that a

county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '_____ county library district', and asking that an annual tax be levied for the purpose herein specified, and specifying in their petition a rate of taxation not less than one mill nor more than two mills on the dollar of assessed valuation; then the county court, if it finds the petition was signed by the requisite number of qualified petitioners and verified in accordance with the provisions of Section 126.040, RSMo, pertaining to initiative petitions, shall enter of record a brief recital of the petition, including a description of the proposed county library district, and of its finding; and shall order that the propositions of such petition be submitted to the voters of the proposed county library district at the next annual school election, or at a special election to be held on date stated in the petition. Under no circumstances shall the election be held less than forty-five days after the filing of the petition. The clerk of the county court shall publish the propositions of the petition in like manner, as near as may be, with the publication provided in section 120.580, RSMo. The clerk shall furnish ballots, poll books and other necessary election items to the various school boards conducting the annual school elections, as provided in section 167.020, RSMo, and all the expense of the election shall be paid out of the treasury of the county as in the case of other county elections. The order of court and the notice shall specify the name of the county and the rate of taxation mentioned in the petition, and the county clerk shall make and file in his office, return of service of such notice.

"2. Every voter within the proposed county library district, in his proper district may vote

'For establishing _____ county library district',

or

'Against establishing _____ county library district',

and may vote

'For _____ mills tax for a free county library',

or

'Against _____ mills tax for a free county library'.

Honorable Paxton B. Price

"In case the boundary limits of any city or town hereinabove mentioned are not the same as the boundary limits of the school district of the city or town, and the school district embraces territory outside the boundary limits of the city or town and within the boundary limits of the proposed county library district, then all voters, otherwise qualified and residing in the school district, but outside the limits of the city or town and within the limits of the proposed county library district, shall be eligible to vote on the proposition, and may cast a vote thereon at the designated polling place within the county. The ballots shall be certified to the county court as provided in section 167.020 RSMo.

"3. In case the proposed mill tax is sought as an increased tax for the maintenance of a library already established hereunder, over a lesser tax rate theretofore voted and adopted, then such fact shall be recited in the petition and the notice for the election, and the ballot shall submit to the voters the proposition

'For a _____ mill tax increase over the present _____ mill tax for the free county library',

or

'Against a _____ mill tax increase over the present _____ mill tax for the free county library'.

If a majority of all the votes cast on the proposition at the election shall be for the tax as submitted, the tax specified in the notice shall be levied and collected in like manner with other county library taxes as provided in section 182.020, and shall be known as and become a part of the 'county library fund' to be administered as provided in section 182.020."

This section provides that the number of qualified electors signing the petition for a county library shall be equal to five per cent of the total vote cast for governor at the last election, outside the territory of all cities and towns of the county, at the time of election for establishment of the library and levy of the mill tax for its maintenance. The obvious meaning of this portion of the section is that the petitioners must be qualified electors of the territory of the proposed library district, and that such district can include only that territory outside of all cities and towns of the county then having free public libraries in operation. Qualified electors residing in a city or town of the county

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having a free public library in operation would not be eligible to sign a petition for the county library district.

Therefore, in answer to the third inquiry of the opinion request, it is our thought that residents of a city of less than five thousand inhabitants, in which a free public library had been established under authority of Section 182.160, RSMo 1949, prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, would not be eligible to sign a petition for a proposed county library under provisions of Section 182.010, RSMo Cum. Supp. 1957.

CONCLUSION

Therefore, it is the opinion of this department that: (1) A city of less than five thousand inhabitants, which had established a free public library and maintained it by a mill tax levied under authority of Section 182.160, RSMo 1949, prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, may continue the operation of their public library after the repeal of Section 182.160 RSMo 1949, but no tax could be levied until the enactment of House Bill 253, of the 69th General Assembly. (2) A city of less than five thousand inhabitants which had established and maintained a free public library under provisions of Section 182.160, RSMo 1949, prior to the effective date of Section 182.140, RSMo Cum. Supp. 1955, may, under provisions of House Bill 253, 69th General Assembly, levy a library tax at the rate and in the manner authorized by Section 182.140, RSMo Cum Supp. 1955. (3) Residents of a city of less than five thousand inhabitants having a free public library established under authority of Section 182.160, RSMo 1949, prior to effective date of Section 182.140, RSMo Cum. Supp. 1955, on August 29, 1955, and still in operation, are not eligible to sign a petition for a proposed county library under provisions of Section 182.010, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

PNC/ld

STATE LIBRARIES: It is the opinion of this department that State aid
STATE AID! cannot legally be given to any public library if the
rate of tax is decreased below the rate in force on
December 31st, 1946. It is the further opinion of
this department that State aid may be granted to any
public library if the rate of tax is not below the rate in force on
December 31st, 1946, and if the library has at least a one mill tax
voted in accordance with sections 182.010 through 182.460, RSMo 1949,
or if the tax income for such library yields one dollar or more per
capita for the previous year on the basis of population as set forth
in the most recent Federal census.

February 13, 1958

Honorable Paxton P. Price
State Librarian
Missouri State Library
State Office Building
Jefferson City, Missouri



Dear Sir:

Your recent request for an official opinion reads:

"This office would appreciate having an opinion
from you on the following question:

'Can the state librarian authorize a
grant in aid under provisions of subsec-
tion 2 of section 181.060, Cum. Supp.
1957, to a city library, if the rate of
tax which has been fixed by popular vote
in such city is below the rate in force
on December 31, 1946?

'When the tax rate for a city library
is not below the rate in force on December
31, 1946, but the rate levied and collec-
ted by such city is less than the library
tax rate voted by the people, can the
state librarian authorize a grant under
provisions of subsection 2 of section
181.060, Cum. Supp. 1957, if at least a
one mill tax which was voted in accordance
with Sections 182.010 through 182.460, RSMo.
was levied, or if the taxes collected for
such library yield an income of one dollar
or more per capita according to the popula-
tion of the latest Federal census.'

Section 181.060, RSMo Cum. Supp. 1957, reads in part:

Honorable Paxton P. Price

"State aid for public libraries--appropriation--allocation.--1. The general assembly may appropriate moneys for state aid to public libraries, which moneys shall be administered by the state librarian, under rules and regulations of the state library commission.

"2. At least fifty per cent of the moneys appropriated for state aid to public libraries shall be apportioned to all public libraries established and maintained under the provisions of the library laws or other laws of the state relating to libraries. The allocation of the moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any library is or may be established, in proportion to the population according to the latest federal census of the cities, villages, towns, townships, school districts, county or regional library districts maintaining tax supported public libraries. No grant shall be made to any public library if the rate of tax or the appropriation for the library should be decreased below the rate in force on December 31, 1946. Grants shall be made to any public library, according to two alternate standards:

"(1) To any public library which has at least a one-mill tax voted in accordance with sections 182.010 through 182.460 RSMo; or

"(2) To any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest federal census."

It would appear to us to be clear that the answer to your first question is definitely answered in the negative by that portion of the portion of Section 181.060, supra, which reads:

" * * * * No grant shall be made to any public library if the rate of tax or the appropriation for the library should be decreased below the rate in force on December 31, 1946. * * * * "

In an opinion rendered on April 22, 1947, to Miss Kathryn P. Mier, State Librarian, a copy of which opinion is enclosed, we held

Honorable Paxton P. Price

that the proper authorities shall not decrease the levy or appropriation for the library fund below the rate or the appropriation in force at the time of the enactment of Senate Bill No. 369 with an emergency clause thereto, which was approved July 10, 1946, without losing state aid. Subsequently, this section was amended as above and the date was extended to December 31, 1946. However, the principle of law involved is the same and we submit the Mier opinion as being, on this point, authority for our position in the instant situation.

We believe that the answer to your second question is in the affirmative. The situation which you set forth there is one in which the library has satisfied the prerequisite to state aid discussed above, which is to say that the tax rate is not below the rate in force on December 31st, 1946.

You do state that the rate levied and collected is "less than the library tax rate voted by the people." We do not believe that this fact disqualifies the library from receiving state aid because there is nothing in the library law as set forth in Chapter 181 or more specifically in Section 181.060, supra, which makes such a matter prerequisite to receiving state aid. We again refer to the Mier opinion which on this point holds that "even though the authorities are not levying and collecting the full amount of the levy adopted at the election creating the public library, that that would not prohibit such library from receiving the aid under said act."

In the situation which you present in your second question, the library has met either one or the other of the requirements set forth in sub-subsection 2 of Section 181.060, supra, to wit, a one mill tax has been voted or where the tax income yields one dollar or more per capita. And the section clearly says that "grants shall be made to any public library * * * *," which meets either of these two alternate standards.

CONCLUSION

It is the opinion of this department that state aid cannot legally be given to any public library if the rate of tax where the appropriation for the library is decreased below the rate in force on December 31st, 1946.

It is the further opinion of this department that state aid may be granted to any public library if the rate of tax is not below the rate in force on December 31st, 1946, and if the library has at least a one mill tax voted in accordance with Sections 182.010

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through 182.460, RSMo 1949, or if the tax income for such library yields one dollar or more per capita for the previous year on the basis of population as set forth in the most recent federal census.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:om

Enclosure

DRIVER'S LICENSE
SUSPENSION:
HABITUAL RECKLESS OR
NEGLIGENT DRIVER:
HABITUAL VIOLATOR OF
TRAFFIC LAWS:

A careless and reckless driving charge can be made only under authority of Section 304.010-1. The Director of Revenue has authority to suspend a license when reliably informed that there is a showing by public records that there has been a sufficient number of convictions to authorize the same.



April 4, 1958

Honorable Charles A. Powell, Jr.
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Powell:

In your letter of the 11th of February you wrote:

"I would appreciate an attorney general's opinion respecting whether a charge which does not include allegations of 'careless and reckless' operation can support a conviction (or a plea of guilty) of careless and reckless driving within the meaning of the 'habitual reckless or negligent driver' definition, Sec. 302.010 (7).

* * * * *

"* * * And I would appreciate, also, an opinion on what information, or report of conviction, the supervisor of the Licensing Department is authorized to act on, in suspending a license. * * *"

The "charge of careless and reckless driving" in this State is brought for violation of the basic rules for careful driving stated in Section 304.010-1. The rule stated therein is worded now as it has been for the past 37 years. The only charge regarding speed it contains is " * * * and at a rate of speed so as not to endanger the property of another or the life or limb of any person."

The section also contained a provision regarding a presumption of a speed that was not careful and prudent but the burden was on

Honorable Charles A. Powell, Jr.

the one making the charge to show that the speed was excessive under the existing circumstances. It will be noted that even now this subsection fixes no definite limit of the miles per hour of the speed at which a vehicle may lawfully be driven on the public highways of Missouri. It is subsections 2 and 3 that do this.

It is now permissible, of course, under subsections 2 and 3, to charge speeding without charging careless and reckless driving. Of course, the speed maximums are not "carte blanche" authority for a driver to operate up to such speeds in all situations. The last sentence of subsection 4 of this section specifically provides "Nothing in subsections 2 and 3 shall make the speeds prescribed therein lawful in a situation that requires lower speed for compliance with the basic rule declared in subsection 1."

Previously the prosecuting attorney did and presumably still may make a charge of careless and reckless driving by coupling with it a charge of a violation of one of the "Rules of the Road" which were expressed in former Section 304.020. *State v. Reynolds*, (App.) 204 S.W.2d 514. Those rules are now contained in Sections 304.014 to 304.025, inclusive.

Your question rephrased is: Is a conviction of a speeding charge by itself a conviction of careless and reckless driving? Obviously, the General Assembly thought it was not. A prosecuting attorney may charge a defendant with violating the speed limit under the authority of subsections 2 or 3 of Section 304.-010 without charging careless and reckless driving, just the same as he might charge a violation of the signaling section, Section 304.019, without charging careless and reckless driving.

It is also obvious from the definitions in Section 302.010 (7) and (8) that the General Assembly recognized the distinction between careless and reckless driving and other moving traffic violations and, surely, if they intended for all speeding violations to be careless and reckless driving, they could have and presumably would have clearly so indicated.

Quite obviously, we think the answer to this question is "no"; a conviction for a speeding violation is not a conviction for a careless and reckless driving violation and may not be used to classify one as "a habitual reckless and negligent driver" as that term is defined in Section 302.010 (7). Consequently, the speeding convictions may not be used as authority to suspend a driver's license under the authority of Section 302.281-1 (2).

Honorable Charles A. Powell, Jr.

In regard to your second question, the "information" or "report of conviction" that the Director "is authorized to act on" is not stated in the statute. As you will note, Section 302.281 states that he shall suspend a license "upon a showing by the records of the director or any public records". Neither is it stated in the statute just what constitutes "a showing by * * * public records". His authority presumably exists if there has been a sufficient number of convictions because then there would most certainly be "a showing by * * * public records". The information the Director must have is the information that the public records somewhere show the sufficient number of convictions. Nothing is provided for the manner in which the Director shall be informed or what the public records show. Experience of the courts and administrative officials has long since shown that information gleaned from hearsay, telephone conversations, newspaper accounts, etc., is quite often not reliable.

You state that a recent suspension was ordered (apparently upon the theory of two careless and reckless driving convictions in two years) when one charge at least was for speeding only and not for careless and reckless driving; that the Director suspended before the convicting court forwarded the required "record of conviction". If you are correct in your statement of the facts, such, in itself, shows that the wisest course for the Director to follow is to act only after obtaining reliable information. However, only experience and good judgment can guide one in his determination as to what information is reliable. The Legislature has stated what information the Director must have. The Legislature could have, but we as one of the executive offices cannot, enumerated all of the ways by which the Director might obtain that information.

CONCLUSION

A speeding violation is not by itself a careless and reckless driving violation.

The Director of Revenue shall suspend a license when his or some public records show a sufficient number of convictions to authorize the suspension.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

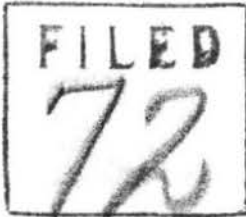
Very truly yours,

John M. Dalton
Attorney General

RSN:hw

PROBATION:

The time spent by a person who has plead guilty, or been found guilty of a crime, and who has been released by the court without imprisonment, subject to the supervision of the court or parole or probation service is time on probation, and such time does not apply under Section 549.275, RSMo 1949, towards final discharge of the prisoner.



April 25, 1958

Board of Probation and Parole
State of Missouri
Jefferson City, Missouri

Gentlemen:

On April 2, 1958, this office received a request for an opinion from Mr. Lewis M. Means, which request reads as follows:

"There is a case in point upon which a decision is requested. On December 5, 1956, one Walter Davis, Docket No. 8882, Jasper County, Missouri, was sentenced by Circuit Judge Woodson Oldham to a sentence of two years, and was immediately placed on probation (termed parole on our copy of docket order). On September 5, 1957, the subject was called before Judge Oldham, and upon evidence of violation of probation, subject's probation was revoked, and he was ordered committed to the institution. He was received at the Missouri State Penitentiary on September 18, 1957, to serve a sentence of two years.

"Under that entry date, his flat time was set at September 17, 1959, and his 9/12ths time March 17, 1959.

"The subject has claimed the right of credit for service of nine months and six days on probation as credit on his sentence. This claim is based upon the basic references above.

"Heretofore the Board has considered that this provision applies only to a person who is on parole, and, therefore, because this subject was on probation and not parole, we believe that he

Board of Probation and Parole

is not entitled to the credit. In view of the third reference, a ruling is desired as to whether or not the second reference applies to persons on probation."

For the purpose of this opinion we assume that the prisoner in question was found guilty, or plead guilty to a felony charge, and was released by the court without imprisonment, subject to supervision of a probation or parole service. We assume further that the terms of such supervision were violated, that said probation or parole was revoked, and said prisoner then committed to your institution.

For the purpose of clarity of this opinion we set out the provisions of Section 549.201, RSMo Cum. Supp. 1957:

"(1) 'Board' means the state board of probation and parole.

"(2) 'Parole' means the release of a prisoner to the community by the state board of probation and parole prior to the expiration of his term, subject to conditions imposed by the board and to its supervision.

"(3) 'Probation' means a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment, subject to conditions imposed by the court and subject to the supervision of a probation service."

The provisions of Section 549.275, RSMo Cum. Supp. 1957, are also set out:

"1. The period served on parole shall be deemed service of the term of imprisonment and, subject to the provisions of section 549.265 relating to a prisoner who is or has been a fugitive from justice, the total time served may not exceed the maximum term or sentence.

"2. When a prisoner on parole, before the expiration of the term for which he was sentenced, has performed the obligations of his parole for such time as satisfies the board that his final release is not incompatible

Board of Probation and Parole

with the best interest of society and the welfare of the individual, the board, subject to the approval of the governor, may make a final order of discharge and issue a certificate of discharge to the prisoner. No such order of discharge shall be made in any case less than one year after the date on which the prisoner was paroled except where the sentence expires earlier."

The terms of Section 549.201, supra, are clear. A prisoner who is released by the court without imprisonment subject to the court's supervision is on probation. A prisoner must have been on parole before he can claim the time spent, according to the provisions of Section 549.275, supra, as applying to his term of imprisonment. According to Section 549.201, supra, parole under this chapter means a release by the State Board of Probation and Parole, prior to the expiration of the prisoner's term subject to the board's supervision. The prisoner in question was released without imprisonment, subject to parole or probation supervision, and thus was on probation prior to his commitment to your institution. Therefore, it is our opinion that time so spent does not apply under Section 549.275, supra, towards final discharge.

CONCLUSION

It is, therefore, the opinion of this Department that the time spent by a person who has plead guilty, or been found guilty of a crime, and who has been released by the court without imprisonment, subject to the supervision of the court or parole or probation service, is time on probation and such time does not apply under Section 549.275, RSMo Cum. Supp. 1957, towards the final discharge of the prisoner.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James E. Conway.

Yours very truly,

John M. Dalton
Attorney General

JEC:om;mw

MERCHANTS:
LICENSE:
TAX:

Warehouses located in Clay County, Missouri storing merchandise for a number of companies whose offices are not in Clay County, Missouri, and which act merely as shipping points for merchandise which has been sold elsewhere are not to be considered merchants within the purview of Chapter 150, RSMo 1949.



October 16, 1958

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Pratt:

We wish to respond to your request of March 10, 1958, which we quote as follows:

"In North Kansas City, Clay County, Missouri we have a warehouse which stores merchandise for a number of companies whose offices are not in Clay County, Missouri. Orders are obtained for the merchant at the main office or one of the branch offices of the company. The orders are then forwarded to the warehouse where they are filled. The merchandise which is in storage at the warehouse may be disbursed locally or anywhere over a large area, just depending upon where the person ordering the merchandise might desire it to be shipped to. The question which is confronting the Assessor is whether or not those companies using the warehouse for storage and a central point of distribution would fall within the purview of Chapter 150 of merchants and manufacturer's license thereby requiring the company storing merchandise in Clay County to obtain a merchants or manufacturer's license and to pay taxes on the merchandise in this county."

It is the opinion of this office that from the facts which you have submitted, those companies which maintain warehouses in Clay County for purposes of distribution of merchandise are not to be deemed merchants in Clay County for the purpose of ad valorem taxation as set out in Chapter 150 of the Revised Statutes of Missouri 1949.

In reaching our conclusion we wish to set out those sections of Chapter 150 which we consider to be controlling. You will note

Honorable Stephen R. Pratt

that Section 150.040, RSMo 1949, is the section which authorizes the ad valorem tax to be levied against the goods, wares, and merchandise of merchants. We quote that section:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Then we direct your attention to Section 150.050, paragraph 1 which we state as follows:

"1. On the first Monday in May, 1946, and on the same date each year thereafter, it shall be the duty of each person, corporation or copartnership or persons, as provided by sections 150.010 to 150.290, to furnish to the assessor of the county in which such license may have been granted, a statement of the greatest amount of goods, wares, and merchandise, which he or they may have had on hand at any one time between the first Monday in January and the first Monday in April next preceding; said statement shall include goods, wares, and merchandise owned by such merchant, and consigned to him or them for sale by other parties."

It is obvious from this section that one of the prerequisites to merchandising within a county is that a merchant's license shall have been granted to the agency engaged in the merchandising business. The person or corporation is to submit to the assessor of the county in which such license may have been granted a statement of the greatest amount of goods and so forth which they may have used in their merchandising.

Section 150.100, RSMo 1949, quoted as follows, states very clearly that no person or corporation shall deal as a merchant without a license first obtained according to law.

Honorable Stephen R. Pratt

"No person, corporation, copartnership or association of persons shall deal as a merchant without a license first obtained according to law; and every applicant for a license shall affirmatively state in a written application whether goods, wares and merchandise are to be sold by applicant at wholesale, at retail, or at both wholesale and retail. Every person or corporation so offending shall upon conviction thereof be deemed guilty of a misdemeanor."

There is no question, therefore, that to engage in the practice of merchandising the person or corporation so engaged must have a license. Then we come to Section 150.120, as a limitation of the license, which we quote as follows:

"No license granted in virtue of this law shall authorize any person, corporation or copartnership of persons, to deal in the selling of goods, wares or merchandise in any other county than the one in which said license was granted, nor at more than one place within the proper county at the same time, nor for a longer period than twelve months."

Although a license may be granted a person or corporation to deal in the selling of goods, wares and merchandise in a particular county, that person or corporation cannot deal in the selling of goods, wares and merchandise in any other county than the one in which said license was granted. It would be necessary for that merchant to be licensed in all counties in which it sought to engage in the business of merchandising.

Therefore, we come to the crucial problem involved in your request, and that is whether the particular agencies in Jackson County, or counties other than Clay County, should also be deemed merchants in Clay County, Missouri, so that it would be necessary for them to obtain a merchant's license in Clay County prior to their selling of goods, wares and merchandise in Clay County. We quote Section 150.010, RSMo 1949, which is the definition, for the purpose of this chapter, of a merchant.

"Every person, corporation, copartnership or association of persons, who shall deal

Honorable Stephen R. Pratt

in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

We feel that this section must be construed as an entirety. You will observe that in speaking of the merchant corporation it refers to it as one who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose. It would seem that it is necessary that the selling of goods be conducted at the store, stand or place occupied for that purpose. We see no case which would suffice to establish the law clearly on this point, which would be based upon facts identical to the ones you have submitted. We find a number of cases, however, which pursue the thought that a merchant, to be held such, engages in the purchasing and selling of goods at the particular store. We wish to call your attention to 57 C.J.S., page 1062, the paragraph dealing with stores, shops or fixed places of dealing. We quote that paragraph as follows:

"There is some conflict with reference to the necessity of a person keeping a shop or store or having a fixed place of business in order to be considered a merchant. In the preceding subdivision it is stated that from the usual definitions given to the term it would seem that two essentials are necessary to constitute a person a merchant in the ordinary meaning of the word, and one of these essentials is that he must buy and sell. What is said to be the second essential is that he must keep a shop or store for that purpose. Thus there is the view that a merchant must have a store, stand, or other place to keep

Honorable Stephen R. Pratt

and sell his goods, and that the term ordinarily contemplates that the merchant is to have a fixed place of business at which he usually sells his merchandise. However, it is recognized that a merchant may buy in one place and sell in another."

We find it difficult to believe that when the agency in the county acts as little more than a warehouse or distribution point for goods, the sale of which has been conducted in another county, and perhaps the payment therefor has also been made in the county in which the sale was conducted, that it could be deemed a merchant within the purview of Chapter 150, RSMo 1949. Every situation will obviously be different. There is no line established by the statutes over which one can state that a corporation is a merchant, or is not a merchant. It appears from your letter that the orders were obtained for the merchant at the main office or one of the branch offices of the company, and that it is only distribution which is made from the warehouses in Clay County. It is our belief that a merchant would be defined as a person engaged in the buying and selling of merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor.

CONCLUSION

It is the opinion of this office that warehouses located in Clay County, Missouri, storing merchandise for a number of companies whose offices are not in Clay County, Missouri, and which act merely as shipping points for merchandise which has been sold elsewhere are not to be considered merchants within the purview of Chapter 150, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James B. Slusher.

Very truly yours,

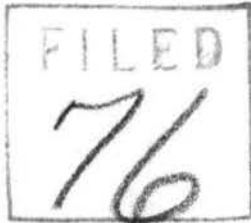
John M. Dalton
Attorney General

JBS:mjb:hw

TAXATION:
STATE TAX COMMISSION:
ASSESSMENT:
PIPELINE COMPANIES:
TELEPHONE COMPANIES:

The exchange equipment of telephone companies and the pumping equipment of pipeline companies, together with the buildings housing the same and the land upon which the same are located, should be assessed by the State Tax Commission.

March 26, 1958



Honorable James M. Robertson
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Robertson:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"A practice has grown up over the years whereby the various local assessors have been assessing the land and buildings housing the pumping stations of pipe line companies and the exchange equipment of telephone companies. The equipment contained in such installations, pumps, switchboards, etc., have been assessed by the State Tax Commission on the theory that this equipment is part of the so-called 'distributable property' of such companies.

"In examining the statutes, it would appear that all of the property comprising such installations, including land and buildings, should be assessed by the Tax Commission because such property is an integral part of the distribution system of these companies.

"Request is made for an opinion as to whether or not all of the above mentioned property should be assessed by the State Tax Commission."

You inquire as to whether the land and buildings housing the pumping stations of pipeline companies and the exchange equipment of telephone companies should be assessed by the State Tax Commission or assessed locally.

Honorable James M. Robertson

Section 138.420, RSMo 1949, provides for the original assessment of certain property of public utility companies by the State Tax Commission in the following language:

"1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms."

Section 153.030, RSMo 1949, provides that:

" * * * all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons."

Paragraphs 2 and 3 of said section more fully provide as follows:

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph,

Honorable James M. Robertson

telephone, electric power and light companies, electric transmission lines, pipeline companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property.

"3. On or before the first day of May in the year 1946 and each year thereafter the president or other authorized officer of each such company shall furnish the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, showing the full amount of all real and tangible personal property owned by each such company on January first of the year in which the report is due."

The manner of levying and collecting taxes on railroad property is contained in Chapter 151, V.A.M.S.

The Supreme Court of Missouri has held in the case of *State ex rel. v. Baker*, 9 S.W.2d 589, 320 Mo. 1146, that the provisions of Sections 138.420 and 153.030, read and construed together, confer upon the State Tax Commission the power of original assessment over only public utilities and that any attempt to confer upon said Commission the power of original assessment over local property devoted to private use would be violative of the Constitution. In view of such fact and in the absence of any information to the contrary, we will, for the purpose of this opinion, assume that the companies to which you refer are "public utilities."

What property of pipeline and telephone companies is subject to assessment by the State Tax Commission and what property of said companies is assessable by the local assessors must be determined from the law relating to the assessment of railroad property, in view of the fact as previously noted that the taxes levied and collected upon such property shall be in the manner as provided by law for the taxation of railroad property (Section 153.030, *supra*).

Section 151.010 provides that all real property, tangible personal property and intangible personal property owned, hired or leased by any railroad company or corporation in this state shall be subject to taxation. Section 151.020, V.A.M.S.,

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specifies what property shall be reported to the State Tax Commission. Said section provides, in part, as follows:

"1. On or before the first day of May in each year, the president or any authorized officer of every railroad company whose road is so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by the president or other authorized officer before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, city or incorporated town, special road district, library district, school districts which levy taxes for library purposes pursuant to section 137.030, RSMo, public water supply, fire protection and sewer districts or subdivisions except other school districts, through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other moveable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof."

Section 151.060, RSMo 1949, provides that the State Tax Commission shall assess, adjust and equalize the aggregate valuation of the property of railroad companies in this state as specified in Section 151.020, supra.

Section 151.100, RSMo 1949, provides for the assessment of other property of railroad companies as follows:

"All real property, or tangible personal property, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, and not herein specified, owned or controlled by any railroad company

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or corporation in this state, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this chapter."

Referring to these two sections, the Supreme Court, in the case of *State ex rel. v. Metropolitan State Railroad Co.*, 161 Mo. 188, stated that for the purpose of assessment the General Assembly has divided railroad property into two classes, one of which could be designated "local" and the other "distributable", the class denoted "local" being that specified in Section 151.100, and the class denoted "distributable" being that specified in Section 151.020. The so-called "distributable" property is assessed as an entirety by the state agency and the so-called "local" property is assessed by the local authorities as other local property is assessed. The Supreme Court of Missouri, in the case of *State ex rel. v. C., R.I. & P. Ry. Co.*, 162 Mo. 391, undertook to state the theory of the system of taxing railroads as follows at l.c. 394:

"The theory of the system of taxing railroads, as contained in our statute, seems to be that the railroad with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the State Board of Equalization. That does not, however, include property that is used by a railroad corporation as a collateral facility to its business, such as workshops, etc., nor property held for purposes other than those of a carrier, all of which is subject to taxation by the local authorities."

See also *State ex rel. v. Baker*, 293 S.W. 399, 403.

With the foregoing rule in mind, we are of the opinion that the exchange equipment of telephone companies and the pumping equipment of pipeline companies, together with the buildings housing the same and the land upon which the same are located, would

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properly be classified as "distributable" property and assessable by the State Tax Commission. The facilities referred to are, we believe, under the rule, necessary appurtenances to the transportation systems of these companies. They are not collateral facilities since without them the system could not operate for its intended purpose.

When we refer to the land upon which the facility is located and the buildings housing the same, we mean only such land and buildings as are reasonably necessary and appurtenant to the efficient operation of the facility and do not mean to hold or infer, for example, that if a utility has exchange equipment located on part of a floor of a multistory office building that the whole of the building and the land upon which the same is situated would be assessable as distributable property. What would be reasonably necessary and appurtenant to the efficient operation of the facility would be a question of fact to be determined in each particular case.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the exchange equipment of telephone companies and the pumping equipment of pipeline companies, together with the buildings housing the same and the land upon which the same are located, should be assessed by the State Tax Commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

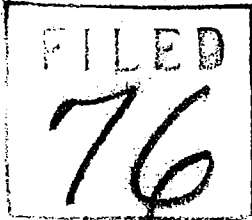
Very truly yours,

John M. Dalton
Attorney General

DDG:hw:lc

STATE TAX COMMISSION:
TAXATION:
ASSESSMENT:

Buildings and structures housing the generating equipment of electric companies which are public utilities, including dam sites and real property used in conjunction therewith, are to be assessed locally and are not to be assessed by the State Tax Commission.



December 9, 1958

Honorable James M. Robertson, Chairman
Missouri State Tax Commission
Jefferson City, Missouri

Dear Mr. Robertson:

Reference is made to your request for an official opinion, which request reads in part as follows:

"Should the generating plants of electric companies which are public utilities, including dam sites and real property used in conjunction therewith, be assessed by the State Tax Commission?"

We understand the question to be whether or not the State Tax Commission should undertake to assess the generating plants, dam sites and real property used in conjunction with an electric company which operates as a public utility or whether such property should be assessed locally. Real property used in conjunction therewith we understand to include, among other things, the submerged land of a hydroelectric generating and distributing company.

Section 138.420, RSMo 1949, provides for the original assessment of certain property of public utility companies by the State Tax Commission in the following language:

"1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms."

Section 153.030, RSMo 1949, provides that:

" * * * all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies

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and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons."

Paragraphs 2 and 3 of said section more fully provide as follows:

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property.

"3. On or before the first day of May in the year 1946 and each year thereafter the president or other authorized officer of each such company shall furnish the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, showing the full amount of all real and tangible personal property owned by each such company on January first of the year in which the report is due."

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The manner of levying and collecting taxes on railroad property is contained in Chapter 151, V.A.M.S.

What property of electric power and light companies is subject to assessment by the State Tax Commission and what property of said companies is assessable by the local assessors must be determined from the law relating to the assessment of railroad property, in view of the fact as previously noted that the taxes levied and collected upon such property shall be in the manner as provided by law for the taxation of railroad property (Section 153.030, supra.)

Section 151.010 provides that all real property, tangible personal property and intangible personal property owned, hired or leased by any railroad company or corporation in this state shall be subject to taxation. Section 151.020, V.A.M.S., specifies what property shall be reported to the State Tax Commission. Said section provides, in part, as follows:

"1. On or before the first day of May in each year, the president or any authorized officer of every railroad company whose road is so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by the president or other authorized officer before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, city or incorporated town, special road district, library district, school districts which levy taxes for library purposes pursuant to section 137.030, RSMo, public water supply, fire protection and sewer districts or subdivisions except other school districts, through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other

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moveable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof."

Section 151.060, RSMo 1949, provides that the State Tax Commission shall assess, adjust and equalize the aggregate valuation of the property of railroad companies in this state as specified in Section 151.020, supra.

Section 151.100, RSMo 1949, provides for the assessment of other property of railroad companies as follows:

"All real property, or tangible personal property, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, and not herein specified, owned or controlled by any railroad company or corporation in this state, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state, and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this chapter."

Referring to these two sections, the Supreme Court, in the case of State ex rel. v. Metropolitan State Railroad Co., 161 Mo. 188, stated that for the purpose of assessment the General Assembly has divided railroad property into two classes, one of which could be designated "local" and the other "distributable," the class denoted "local" being that specified in Section 151.100, and the class denoted "distributable" being that specified in Section 151.020. The so-called "distributable" property is assessed as an entirety by the state agency and the so-called "local" property is assessed by the local authorities as other local property is assessed.

Attention is invited to the case of State ex rel. Union Electric Light & Power Co. v. Baker, 293 S.W. 399. In that case the relator attacked the assessment of its property by the State Tax Commission under the authority of the above noted sections basically upon the grounds that the statutes failed to designate the specific property of said relator subject to assessment by the State Tax Commission and that the method of assessment

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designated by the statutes was so indefinite and uncertain as to be unworkable and, therefore, conferred no jurisdiction upon said Commission in the premises. In answering relator's contention, the court in its opinion stated (l.c. 403-404):

" * * * A clear distinction is thus drawn between property directly and that indirectly or collaterally involved in the business of a railroad which traverses counties, municipal townships, and incorporated cities, towns, and villages. The business of generating and distributing light, heat, and power by transmission lines and their necessary appurtenances has the same inherent characteristic of traversing counties, municipal townships, and incorporated cities, towns, and villages, and when the statute requires its president or other chief officer to render a statement of its property 'in like manner' as a railroad president or chief officer, we think he should be guided by this same distinction which we have heretofore recognized as controlling in the return of railroad property. Nor do we conceive that the scope of section 13002 is limited to the property therein specifically designated; namely, roads, double or side tracks, depots, water tanks and turntables, engines and cars. The designation of property herein concludes with the general clause, 'and all other movable property owned, used or leased by them,' etc. The rule of ejusdem generis is applicable, and the words 'all other movable property' clearly means property of the same general nature or class as that previously specified; that is, property directly used and necessary to the railroad's efficient equipment as a means of traffic. 36 Cyc. 1119. This statute has been in force for many years, and we are not advised that its validity has ever here been drawn in question on the ground that the method provided is ambiguous or unworkable in the assessment of this class of railroad property. Furthermore, section 13056, as originally enacted (Laws Missouri 1877, pp. 391, 392), was limited to bridge, telegraph, and express companies. Telephone companies were subsequently included (Laws Missouri 1901, pp. 223, 224), and in 1923

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electric power and light companies, electric transmission lines, and oil pipe lines were included by the amendment now under consideration. The properties directly involved in the prosecution of the various kinds of business enumerated in this statute, like that of railroads, all have the common characteristic of traversing and extending in and through various counties, municipal townships, and incorporated cities, towns, and villages. Through all these years this statute has been uniformly administered by respondents in accordance with its provisions without question as to its meaning, until the present suit arose apparently out of relator's exception to the valuation placed by respondents on this class of relator's property. The executive construction thus placed on this statute is also entitled to great consideration. The doctrine is thus stated in 36 Cyc., pages 1140, 1141:

"The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous."

"The provision of amended section 13056 that relator make return of its property 'in like manner' as a railroad company means that it shall return its property of the same general character or class; that is, its transmission lines and all movable property necessarily appurtenant and directly used in their efficient equipment as a means of distributing electrical energy, light, heat, and power. We do not regard the method of return here provided as ambiguous or unworkable in the assessment of relator's property by the state tax commission."

We believe that it is significant that in referring to the property which was to be returned to the State Tax Commission

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for assessment the court referred to transmission lines and all movable property necessarily appurtenant and directly used in their efficient equipment as a means of distributing electrical energy, light, heat and power.

A company which distributes to the consumer light, heat, power or electrical energy which it produces is engaged in a two-phase operation. The production and the distribution. It is our opinion that only the property which is necessarily appurtenant and directly used in the distribution of electrical energy, light, heat and power would be subject to assessment by the State Tax Commission, and that buildings and structures housing generating equipment, dam sites, and real property used in conjunction therewith would be properly subject to assessment by local authorities.

We understand that the conclusion here reached is the construction adopted by the State Tax Commission and has been uniformly applied over the years. As was pointed out in the Baker case, supra, the construction placed upon a statute by the officers whose duty it is to execute it is entitled to great weight and should not be disregarded or overturned unless it is clearly erroneous. In other words, we are of the opinion that the property referred to should be assessed according to the established and long standing practice.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that buildings and structures housing the generating equipment of electric companies which are public utilities, including dam sites and real property used in conjunction therewith, are to be assessed locally and are not to be assessed by the State Tax Commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:hw

BIENNIUM:
GENERAL REVENUE:
STATE TREASURER:



Moneys and funds for which balances are subject to transfer to General Revenue shall be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer at the end of the biennium after all warrants on same have been discharged and the appropriation thereof has lapsed.

July 22, 1958

Mr. John W. Schwada
State Comptroller and
Director of the Budget
State Capitol
Jefferson City, Missouri

Dear Mr. Schwada:

This is in response to your inquiry for an opinion, May 28, 1958, which we quote in part as follows:

"Because the State is operating on annual appropriations for the 1957-58 fiscal year, the question has been raised concerning interpretation of Section 33.080 RSMo. This section provides for the deposit of money in the State Treasury to the credit of particular funds subject to appropriation by the General Assembly. * * *

* * *

"This clause refers to the transfer of moneys from special funds to General Revenue both at the end of the biennium and after the appropriation has lapsed. Appropriations for 1957-58 lapse on December 31, 1958, but this date does not end a biennium.

"The question is: Must moneys in funds for which balances are subject to transfer to General Revenue, be transferred on December 31, 1958?"

Article IV, Section 23, of the Missouri Constitution of 1945 states:

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"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the sixty-third general assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

We quote Section 33.080 of the Revised Statutes of Missouri, 1949, as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source: Appropriations, gifts, or

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grants from the federal government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly."

It is our opinion that moneys and funds for which balances are subject to transfer to General Revenue shall be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer at the end of the biennium. We do not feel that those moneys should be transferred prior to the end of the biennium.

Although Article IV, Section 23, authorized the general assembly to make appropriations for one or two fiscal years, we do not feel that this serves to bind the general assembly in the manner in which it chooses to provide for the collection of funds and the crediting thereof to specific accounts. Unless the general assembly specifically provides that moneys and funds for which balances are subject to transfer to General Revenue shall be transferred at the lapse of a particular appropriation we believe that there is no such inference in Article IV, Section 23 of the Constitution. There is apparent no restriction which would preclude the General Assembly from permitting specified agencies to retain in their credit account sums which they have collected, but for which there has been no appropriation to extend beyond a one-year period.

Webster's New International Dictionary, Second Edition, defines the term "biennial" as "something which takes place or appears once in two years as a biennial examination".

Webster defines "biennium" as "a period of two years".

The wording of Section 33.080, RSMo 1949, has not been changed since its enactment in 1933. At the time such statute was placed on the books, and until adoption of Missouri's Constitution of 1945, appropriations by the general assembly to support state agencies were made on a two year, or a biennium term. We believe that at the time this section was originally enacted the only logical construction that could have been placed upon it would be to the effect that the statute was to mean that the transfer would be made after all warrants on the unexpended balance remaining in all such funds have been discharged, and the appropriation thereof has lapsed, at the end of the biennium only. Since the general assembly chose not

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to amend Section 33.080 at the time of, or subsequent to, the acceptance of Article IV, Section 23 of the Missouri Constitution, 1945, we believe that there was no intention to restrict the period of crediting or collecting funds of the specified agencies to an appropriation period of one year.

CONCLUSION

It is the opinion of this office that moneys and funds for which balances are subject to transfer to General Revenue shall be transferred and placed to the credit of the ordinary revenue fund of the State by the State Treasurer at the end of the biennium after all warrants on same have been discharged and the appropriation thereof has lapsed.

Sincerely yours,

JOHN M. DALTON
Attorney General

JBS/mjb

CONSTITUTIONAL LAW: (1) Constitutional Amendment No. 1, appearing on
STATE COMPTROLLER: the ballot as Proposition No. 3 in the November 4,
STATE AUDITOR: 1958 general election amending Sections 22 and 28
of Article IV of the Missouri Constitution of 1945,
is "self-executing" and the full operation of the
same is not dependent upon legislative action. (2) Any and all stat-
utory provisions in "conflict" with said amendment (the amendment being
the last expression of the lawmaking power) and its full operation,
are, insofar as their future operation is concerned after the effective
date of the amendment, deemed repealed. (3) The signature of the
state auditor on the form of warrant now in supply would not in any-
way affect its efficacy.

December 5, 1958

Honorable John W. Schwada
Comptroller and Director of Budget
State Capitol Building
Jefferson City, Missouri

Dear Dr. Schwada:

Reference is made to your request for an official opinion,
which request reads in part as follows:

"Constitutional Amendment No. 1, appearing
on the ballot as Proposition No. 3, submitted
to the voters of the State the Fourth Day of
November, 1958, amends Sections 22 and 28 of
the Constitution. The changes in these sec-
tions affect the duties of the State Auditor
and the duties of this office. * * *

"Since Sections 22 and 28 of the Constitution,
as amended, make significant changes in the
responsibilities of this office and the office
of the Auditor, I am asking for your written
opinion on these questions:

- (1) Are the amended provisions self-executing?
- (2) If the answer to the first question is in the affirmative, must the Auditor and the Comptroller act in accordance therewith, regardless of the existence of conflicting statutory provisions?
- (3) If the answer to the first question is affirmative, may the Comptroller, while certifying claims and accounts directly to the Treasurer for payment in accordance with the last sentence of Section

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22, as amended, pass the warrants prepared by this office through the office of the Auditor for the addition of his signature? (At present the warrant contains a space for the signature of the Auditor. Should we continue to use the identical warrant form until our existing supply is exhausted and should the Auditor not place his signature thereon, it is possible that some unnecessary correspondence would be required to explain the absence of his signature.)"

Constitutional Amendment No. 1, which appeared on the ballot as Proposition No. 3 in the November 4, 1958 general election, reads as follows (Laws of Missouri, 1958, Second Extra Session, pp. 195-196):

"Section 1. Sections 22 and 28 of Article IV of the Constitution of the State of Missouri are repealed and two new sections enacted in lieu thereof, to be known as sections 22 and 28 of Article IV of the Constitution of Missouri, and to read as follows:

"Section 22. The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection, budget and comptroller, and other divisions as provided by law. The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. The division of the budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state treasurer for payment.

"Section 28. No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of

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be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The ballot title to said amendment was as follows:

"An amendment relating to the department of revenue and its divisions; together with the manner in which money may be withdrawn from the state treasury."

(The resolution calling for the submission of the proposed amendment to the qualified voters of the State of Missouri, while found in the Session Laws 1958, Second Extra Session, was actually adopted at the Regular Session of the 69th General Assembly.)

Before proceeding to your first question, we wish here to note the changes contemplated by said amendment. First, Section 22 of Article IV of the 1945 Constitution provided that:

" * * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state auditor for payment."

Under the amendment above set out, this provision was changed to read:

" * * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state treasurer for payment."

The only change was the substitution of the word "treasurer" for the word "auditor." The effect of the change is this. Whereas previously the comptroller made the required certifications to the state auditor, under this amendment the certifications by the

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comptroller would be made to the state treasurer. No further changes in Section 22 were encompassed within the amendment.

Section 28 of Article IV of the 1945 Constitution provided that:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. * * *"

By the amendment, the words "the state auditor" were deleted. The effect of the change is this. Whereas previously it was the constitutional duty of the state auditor to certify "that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it", this duty placed upon the auditor was, insofar as the Constitution is concerned, eliminated by the amendment and the same duty placed upon the comptroller. No other and further changes were made in Section 28 by the amendment.

Bearing in mind these changes sought to be accomplished by the amendment and assuming that said amendment carried, we proceed to your first question as to whether the amended provisions (particularly the changes above noted) are self-executing.

The term self-executing simply means capable of fulfillment without the aid of any legislative enactment. *State ex inf. v. Duncan*, 265 Mo. 26, 175 S.W. 940, 1.c. 945; *State ex rel. v. Toberman*, 232 S.W. 2d 904, 1.c. 905.

The rule for determining whether a constitutional provision is or is not self-executing has been laid down by the Supreme Court of Missouri in the case of *State ex rel. v. Smith*, 194 S.W.2d 302, 1.c. 304, wherein the court quoted with approval from 11 Am.Jur. Constitutional Law, Sec. 74, pp. 691-692, as follows:

" * * * 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of

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which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' * * *"

See also *State ex rel. v. Toberman*, 232 S.W.2d 904, 906, and *Wann v. Reorganized School District No. 6*, 293 S.W.2d 408, wherein the same rule is recognized.

In the case of *State ex inf. v. Ellis*, 28 S.W.2d 363, 1.c. 365, the Supreme Court of Missouri recognized the rule stated in 12 C.J., p. 729 as follows:

"The general rule is thus stated in 12 C.J. p. 729:

"'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

"'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'

"And further, page 730:

"'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on the legislative will.'"

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See also State ex inf. v. Wymore, 119 S.W.2d 941, wherein the latter rule was again recognized.

We further note the following from the case of State ex rel. v. Toberman, supra, at l.c. 905-906:

"In State ex inf. Barker v. Duncan et al., 265 Mo. 26, 175 S.W. 940, loc. cit. 945, this court, quoting with approval from an opinion of the Supreme Court of Colorado, held that: 'Constitutional provisions are self-executing when it appears that they shall take immediate effect, and ancillary legislation is not necessary to the enjoyment of the right thus given, or the enforcement of the duty thus imposed; in short, if a constitutional provision is complete in itself, it executes itself'; and further held, quoting from an opinion of the Supreme Court of the United States, Davis v. Burke, 179 U.S. 399, 21 S.Ct. 210, 45 L.Ed. 249, that: 'Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down * * * general principles, * * * it may need more specific legislation to make it operative; in other words, it is self-executing only so far as it is susceptible of execution. But where a Constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions.'"

Lastly, we call attention to the case of McGrew Coal Co. v. Mellon, 287 S.W. 450, 454, wherein it is stated:

"There can be no question that constitutional provisions, creating a right or imposing a duty or a liability, where none existed before, and making no provision for the passage of laws by the Legislature to enforce same, are self-enforcing. * * *"

Viewed in the light of the above noted rules, we have no hesitancy in stating that in our opinion the above amendment is self-executing. The constitutional duty placed upon the comptroller by said amendment to certify that the expenditure is within the purpose of the

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appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it, was not contained in the 1945 Constitution. Neither was the new constitutional duty placed upon the comptroller to certify claims and accounts to the "state treasurer" for payment contained in the 1945 Constitution. These new duties are not mere general principles but are duties, the nature and extent of which are fixed by the Constitution itself. Nothing need be done by the Legislature to define the nature and extent of these duties. Indeed, it is inconceivable wherein legislation could more clearly specify these duties. Further, nothing contained in the amendment, either directly or indirectly, indicates that the subject matter contained therein was to be referred to the Legislature for action.

By the same token, it is no longer the constitutional duty of the state auditor, previously imposed upon him by Section 28 of Article IV of the 1945 Constitution, to make the certification now imposed upon the comptroller by the amendment.

Lastly, we invite attention to the history of this constitutional amendment. By House Bill No. 301, enacted by the 67th General Assembly, there was established "The State Reorganization Commission" for the study of state executives, offices, departments and agencies. This Commission submitted its report to the Governor under date of January 10, 1955. One of the recommendations contained in this report was "that all preauditing functions be placed as the direct responsibility of the comptroller." Assigned as reasons for the recommended changes was that the procedure by which the auditor preapproves warrants before he countersigns them does not in practice constitute added protection against unwarranted expenditures because the auditor must use the ledgers maintained by the comptroller to ascertain that the expenditures are within the appropriation and that there is a sufficient balance upon which the warrant is drawn to pay it. This Commission further pointed out that no good purpose seemed to be served in having the state auditor make a postaudit of the comptroller's office since he had already approved and signed all warrants issued by the comptroller. In other words, under his duty to postaudit, the auditor would merely be auditing his own preaudit.

The matters above considered, it is readily seen that the purpose of the amendment was to remove an existing "mischief." Under such circumstances, the constitutional amendment should not be construed as dependent for its efficacy and operation on the legislative will. *State ex inf. v. Ellis, supra.*

Before passing to your next question, we wish to note the following from the opinion of the court in the case of *State ex*

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rel v. Romero, 124 P. 649, 651, which rule is, we believe, founded upon reason and logic, consistent with the rules laid down by the Supreme Court of Missouri, noted supra, and in conformity with the conclusion herein reached:

"If a constitutional provision, either directly or by implication, imposes a duty upon an officer, no legislation is necessary to require the performance of such duty."

You next inquire whether the auditor and the comptroller must act in accordance with the constitutional amendment when the same becomes effective regardless of the existence of "conflicting" statutory provisions. Our answer is in the affirmative. Such statutory provisions as are in "conflict" with the constitutional amendment and the enjoyment of its full operation would be deemed repealed. The rule in this regard is succinctly stated by the Supreme Court of Missouri, en banc, in the case of Marsh v. Bartlett, 121 S.W.2d 737, 745, as follows:

"With statutes inconsistent with Amendment No. 4 we have nothing to do. Such as were inconsistent, including said section 8270, were expressly repealed by that instrument. Repeal in that manner is all-sufficient, for a statute may be nullified, in so far as future operation is concerned, by a constitution or a constitutional amendment as well as by statute; and the constitution or the amendment, as the highest and most recent expression of the lawmaking power, operates to repeal, not only all statutes that are expressly enumerated as repealed but also all that are inconsistent with the full operation of its provisions. 12 C.J., sec. 97, pp. 725, 726. A provision may be so framed, however, that, while legislation is necessary to put into effect its affirmative principles, it repeals existing statutes inconsistent with it. Id., pp. 727-728, sec. 4."

It is the opinion of this office that where, as is now provided by the amendment, the comptroller is directed to certify claims and accounts to the "state treasurer for payment," such certification is sufficient warrant for the treasurer to make payment and that the treasurer would not be justified in refusing to pay the same because of any lack of certification by any

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other state officer. On the other hand, and in answer to the last question, we do not believe that the signature of the state auditor on the form of warrant now in supply would in anyway affect its efficacy.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that: (1) Constitutional Amendment No. 1, appearing on the ballot as Proposition No. 3 in the November 4, 1958 general election amending Sections 22 and 28 of Article IV of the Missouri Constitution of 1945, is "self-executing" and that the full operation of the same is not dependent upon legislative action. (2) Any and all statutory provisions in "conflict" with said amendment (the amendment being the last expression of the lawmaking power) and its full operation, are, insofar as their future operation is concerned after the effective date of the amendment, deemed repealed. (3) The signature of the state auditor on the form of warrant now in supply would not in anyway affect its efficacy.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

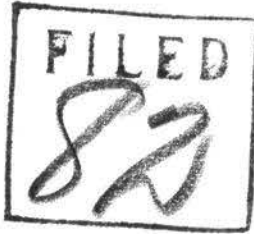
Very truly yours,

John M. Dalton
Attorney General

DDG:hw

TRAVELING EXPENSES:
APPROPRIATIONS:
COMMISSIONS:

Members of the Missouri Commission on Human Rights may be reimbursed for travel expenses incurred in the necessary conduct of the commission's business.



August 26, 1958

Honorable Gregory E. Shinert
Executive Director
Missouri Commission on Human Rights
15 North Grand Boulevard
St. Louis 3, Missouri

Dear Mr. Shinert:

This is in response to your request for an opinion from this office under date of July 29, 1958.

From your letter we observe that the problem with which we are confronted is whether members of the Missouri Commission on Human Rights are allowed travel expenses as personal services and operations when the law creating the commission states that the eleven members shall serve without compensation.

The Missouri Commission on Human Rights was established by House Bill No. 125 of the Sixty-Ninth General Assembly, Laws of Missouri 1957, p. 299. Section 2 of said bill provides:

"There is hereby created a Commission on Human Rights. It shall consist of eleven members, one from each congressional district of this state, serving without compensation, to be appointed by the governor. One of the members shall be appointed chairman by the governor. Of the eleven members first appointed, three shall be appointed for one year, four for two years, and four for three years; thereafter, all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his successor shall be appointed to serve for the unexpired period of the term for which such member had been appointed."

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It is the opinion of this office that members of the Commission on Human Rights are entitled to payment for their traveling expenses in spite of the provision that the commission shall serve without compensation. We quote from 15 C.J.S., p. 62, in part, as follows:

"It has been said the 'compensation' connotes the use of money, implies an accruing benefit in form of an anticipated or prospective profit, a benefit conferred, a consideration, a definite benefit, either absolute or contingent, a specific cash payment or its equivalent in the form of security or obligation which in reasonable certainty will produce payment with due promptness; * * *"

We feel that the term "compensation" as used in House Bill No. 125 contemplates benefit or reimbursement for services performed, and we do not believe that the provisions against "compensation" in that house bill is meant to preclude payment for actual expenses involved in the necessary travel for purposes of the business of the commission.

To substantiate our position we would like to call your attention to some cases which lend their support. In *State vs. Yell*, 110 Pac 2d 162, the Washington Supreme Court held that reimbursements provided in a statute which appropriates money to reimburse members of the Legislature for their expenses for sustenance and lodging while absent from their usual places of residence in the service of state did not increase the "compensation" of members of the Legislature within the meaning of the constitutional provision that compensation of public officers shall not be increased or diminished during their terms of office.

In *State v. Thomason*, 221 S.W. 491, 494, the Supreme Court of Tennessee stated:

"That the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared, is well established upon reason and authority, and the apparently uniform consensus of opinion in those cases wherein the question has been considered is to the effect that constitutional prohibitions against change in the compensation fixed for public officers are not intended to be construed as limitations

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upon legislative authority to provide for the expenses of such officials."

We feel, in view of the cases cited, that the Legislature did not intend that the members of the Commission should not be allowed traveling expenses. To leave the commission without benefit of reasonable expense allowances would be to minimize the practical effect of the commission.

Section 9.320 of House Bill No. 346, Sixty-Ninth General Assembly, Second Extraordinary Session provides as follows:

"There is appropriated out of the State Treasury, chargeable to the General Revenue Fund, Nine Thousand Dollars (\$9,000), for the use of the Commission on Human Relations, as provided by law, for personal service and operation, for the period beginning July 1, 1958, and ending June 30, 1959."

Since House Bill No. 34 appropriates out of the State Treasury the sum of Nine Thousand Dollars (\$9,000) for the use of the commission's own personal service and operation we believe that this appropriation may be used for such items as traveling expenses and those items of actual expense incurred by members of the commission in the necessary conduct of the commission's affairs.

CONCLUSION

It is the opinion of this office that members of the Missouri Commission on Human Rights may be reimbursed for travel expenses incurred in the necessary conduct of the commission's business.

Very truly yours,

JOHN M. DALTON
Attorney General

JBS/njb

CIRCUIT COURTS: Jackson County circuit court, en banc, is without authority to order transfer of circuit judge from either of two divisions of said circuit court required to sit at Independence, to try causes pending in the several divisions of said circuit court sitting in Kansas City. Said circuit court, en banc, may designate divisional judges sitting at Independence as presiding or assignment judge of circuit court of Jackson County.

March 19, 1958



Honorable Floyd L. Snyder, Sr.
Member, Missouri House of Representatives
521 South Noland Road
Independence, Missouri

Dear Mr. Snyder:

This opinion is rendered in reply to your recent inquiry reading as follows:

"An opinion is requested of your office on the following question:

Can the circuit court of Jackson County en banc, in view of the provisions of Nos. 478.463 to 478.507, RSMo 1957 Supp., transfer a judge of divisions 12 or 13 from Independence to sit in Kansas City either to try causes or to act as presiding or assignment judge when the judge from the Independence division is not transferred to sit for or to replace another judge of one of the Kansas City divisions.

"In this connection may I call your attention to the following: Section 478.463, RSMo 1957 Supp., reads in part:

'The circuit court of the county of Jackson, comprising the sixteenth judicial circuit, shall be composed of thirteen divisions and a judge shall be selected to preside over each division. Divisions one to eleven shall sit at the city of Kansas City and divisions twelve and thirteen shall sit at the city of Independence.' (Underlining supplied)

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"Section 478.473, RSMo 1957 Supp., gives the court en banc the authority to transfer civil cases among the several divisions but says nothing about the transfer of a judge. This is also true of No. 478.507, RSMo 1957 Supp. Does this authority to transfer cases from Independence to Kansas City carry with it the right to transfer the judge of Divisions Nos. 12 or 13 from Independence to Kansas City?"

"I call your attention also to State ex rel Louis Walker, Jr. vs. John R. James, Judge, in which the Supreme Court issued, on June 30, 1955, a preliminary rule of prohibition, which preliminary rule provides that the respondent judge might proceed with the trial of the State of Missouri vs. Walker in his own division at Independence, or in the alternative show cause why the trial of the case by him in Kansas City should not be prohibited. The respondent judge failing to make a return to this preliminary rule of prohibition, it was made absolute on September 30, 1955. Is this rule of prohibition pertinent to the question herein involved.

"An early reply will be appreciated."

At the very outset, we construe the request for this opinion as conceding that the transfer of judges among the different divisions of the circuit court of Jackson County may become an accomplished fact by invoking appropriate Rules of the Supreme Court of Missouri and applicable constitutional provisions.

The right to exercise judicial power is treated in the following language from Rhodes v. Bell, 230 Mo. 138, 1.c. 149:

"That the Legislature has the power to fix the times for holding the regular terms of court and that this court has held that the judicial power can only be exercised at the time and places prescribed by law, is the recognized law of this State."

Sections 478.463 to 478.510 RSMo 1949, as amended, have particular application to Jackson County, Missouri, comprising the sixteenth judicial circuit in Missouri. Section 478.463 RSMo 1949, Cum. Supp. 1957, provides:

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"The circuit court of the county of Jackson, comprising the sixteenth judicial circuit, shall be composed of thirteen divisions and a judge shall be selected to preside over each division. Divisions one to eleven shall sit at the city of Kansas City and divisions twelve and thirteen shall sit at the city of Independence. The divisions of said circuit court sitting at Kansas City heretofore existing shall continue as divisions one to nine thereof and the Independence division heretofore existing shall hereafter be designated division twelve of the circuit court. Nothing herein contained shall affect the tenure or rights of succession of any judge heretofore serving in any division of said circuit court."

The foregoing statute is positive in directing that divisions one to eleven shall sit at the city of Kansas City, and that divisions twelve and thirteen shall sit at the city of Independence. While the circuit court of Jackson County is divided into thirteen separate and distinct divisions, we do notice the following language from *Acy v. Inland Security Company*, 287 S.W. 2d 347, 1.c. 350:

"The circuit court of Jackson County, although composed of several divisions, constitutes but one court."

Section 478.473 RSMo 1949, Cum. Supp. 1957, spells out the powers of the circuit court of Jackson County when sitting en banc, in the following language:

"1. The court en banc shall have power to frame and enact such rules for the numbering of civil cases now pending, or hereafter brought therein, for the proper distribution of civil cases for trial and disposition among the several divisions of said court at Kansas City, and for the transfer of civil cases to and from each of the several divisions at Kansas City and the divisions at Independence, which rules may in like manner be changed from time to time, as may be found necessary.

"2. Said judges of said court en banc, or a majority of them may in like manner make, from time to time, such other rules for said court as may be agreeable to the usages and principles of law and not inconsistent with the code of procedure and the constitution and laws of this state.

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But the court en banc shall have no power to review any order, decision or proceeding of the court in division."

A close reading of Section 478.473, supra, discloses that authority is vested in the circuit court of Jackson County, when sitting en banc, to assign and transfer causes to the different divisions of said court. We also note in said statute an absence of any language giving the circuit court en banc any authority to order the transfer of a judge from divisions twelve and thirteen in order that he may "sit at the city of Kansas City," as such language is used in Section 476.463 RSMo 1949, Cum. Supp. 1957, for the purpose of trying causes assigned to any of the eleven divisions of said circuit court required to sit at the city of Kansas City. We find no provision in Missouri's Constitution of 1945 authorizing the circuit court en banc of Jackson County to order the transfer of circuit judges selected to sit at the city of Independence. Absent constitutional and statutory authority, it must be concluded that the circuit court en banc of Jackson County is without authority to order the transfer of a circuit judge from either of the two divisions of said court sitting at Independence to try causes pending in the several divisions of said court sitting at Kansas City, Missouri.

We next consider that phase of the inquiry touching authority of the circuit court en banc to order either of the judges of the two divisions of said court sitting at Independence to act as "presiding or assignment judge" of the Jackson County circuit court. Authority for the circuit court of Jackson County to sit en banc is found in Section 478.470 RSMo 1949, Cum. Supp. 1957, reading as follows:

"The said circuit court may sit, both en banc and separately, in the several divisions in said court in said Kansas City, as the business thereof may require. When the court sits as a court en banc, one of the judges shall act as presiding judge, as the rules of the court shall direct."

The "said circuit court" referred to in Section 478.470, quoted supra, necessarily refers to the circuit court of thirteen separate divisions constituted by Section 478.463 RSMo 1949, Cum. Supp. 1957, quoted in the forepart of this opinion. We find no language in the statutes being construed, and heretofore cited, which indicate that the circuit court en banc of Jackson County is to be made up of fewer than all judges in the thirteen separate divisions. With the circuit court en banc so constituted, it is not reasonable or feasible to permit parts of the whole to escape duties imposed upon the court en banc by statute but the court en banc, under Section 478.470, Cum. Supp. 1957, can only sit in Kansas City. To require a judge of either of the two divisions in Independence to serve as presiding judge of the court

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en banc or assignment judge thereof should not be considered as violating the provisions of the statute requiring such judges to sit at the city of Independence in the trial of causes assigned to those divisions. The designation of a judge of one of the divisions sitting at Independence as assignment judge should not be considered as authorizing such judge to sit for the trial of any causes.

Sections 478.463, 478.470 and 478.473, RSMo Cum. Supp. 1957, on their face suggest ambiguity, and it is suggested that desired clarification can best be obtained by legislative amendment of said statutes.

CONCLUSION

It is the opinion of this office that the circuit court, en banc, of Jackson County, Missouri, is without authority to order the transfer of a circuit judge from either of the two divisions of said court, required to sit at the city of Independence, to try causes pending in the several divisions of said court sitting in Kansas City, Missouri. It is further ruled that the circuit court en banc of Jackson County may designate either of the divisional judges sitting at the city of Independence as presiding or assignment judge of the circuit court of Jackson County without violating statutory provisions requiring such judges to sit at the city of Independence in the trial of causes assigned to those divisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO 'M:om

INSANE:
PROSECUTING ATTORNEYS:
DEPOSITIONS:
PROSECUTING ATTORNEY'S
EXPENSES:

A person who is now a nonresident, but who has been properly declared insane by a Missouri court, can apply to the probate court in the county in which he was adjudicated insane for restoration of his sanity. He need not be personally present on the day of the hearing, and he may have depositions, properly taken, introduced as evidence in the case. The county court, if they believe that the expenditure of public funds is justified by the magnitude of the public interest in the case, may pay the prosecuting attorney's travel expense out of state to take depositions.

June 6, 1958

Honorable LeRoy Snodgrass
Prosecuting Attorney
Tuscumbia, Missouri

Dear Sir:

You recently asked the opinion of this office on the following matter:

"The Probate Judge of Miller County, the Hon. Chas. M. Abbett, had requested an opinion from me in writing as to the following:

"May the Probate Court make an order restoring an incompetent (insane) person to full capacity upon the basis of depositions taken in another state, where the person sought to be restored is not and will not be present before the Court?

"In this specific case, the party was declared insane by the Probate Court, later was discharged from State Hospital No. 1 at Fulton, Missouri, has moved to the State of California and has remained out there for a number of years.

"The question goes further than as to the admission of testimony by deposition. There could be a question as to identification, and with the depositions being taken in a distant state, I would like to know what provisions, if any, for the payment or presence of an attorney or representative of the State to be at the taking of such depositions."

The first problem involved in your opinion request is whether a now nonresident, who was properly declared incompetent by a court in Missouri, may petition this court for restoration of his



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sanity. Section 475.360, RSMo Cum. Supp. 1957, reads as follows:

"For and on behalf of any person previously adjudged to be incompetent or of unsound mind by any court in the state of Missouri, there may be filed in the probate court of the county wherein he was adjudged incompetent or of unsound mind, a petition in writing, verified by oath or affirmation, alleging that subsequent to such adjudication he has fully recovered his mental health and been restored to his right mind, and is now capable of managing his affairs, and the probate court wherein the petition is filed shall hold an inquiry as to the mental condition of the person in whose behalf the petition is filed. If the court, upon the inquiry, finds that the person is not restored to his right mind, and such person, or anyone for him, within ten days after such finding, files with the court an allegation in writing, verified by oath or affirmation that the person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

Volume 32, C.E., Section 326, says:

"An application for restoration to sanity is not a new proceeding; it is a continuation of the original guardianship proceeding."

Volume 44, C.J.S. Section 55, says, in part:

"A proceeding for judicial restoration to competency is a special proceeding, of a summary character, and is regarded not as a new proceeding, but as a continuation of the original guardianship proceeding."

It seems clear from these citations that a person who has been adjudged insane by a court in the State of Missouri, may file a petition for restoration in the probate court of the county wherein he was adjudged insane.

Honorable LeRoy Snodgrass

Restoration and sanity hearings are basically similar. The only difference being that the burden of proof in the sanity hearing is on the petitioner who wishes to have someone declared insane, and the burden of proof in restoration proceedings is on the person who wants to have his sanity restored. In this regard see State v. Skinker, 126 S.W. 2d 1156, 1.c. 1159:

"It necessarily follows that, upon this inquiry under section 493, upon alleged restoration to rightness of mind or discharge from guardianship, the same issues as to sanity or insanity at the time of the later inquiry and as to the capacity of the subject to manage his affairs are in question as were in question upon the previous inquiry under section 448 upon the original inquiry under which he was adjudicated to be a person of unsound mind and incapable of managing his affairs. The only difference in such inquiries is as to the burden of proof. In the original inquiry, the burden was upon the petitioner or informant seeking the adjudication of appellant's unsoundness of mind. In the later inquiry, the burden was upon the appellant, the petitioner who seeks his discharge to show his restoration to his right mind. * * *

Insanity hearings are in the nature of civil suits, they are in personam actions. See State v. Holcamp, 51 S.W. 2d 13, 1.c. 19, in which the court said:

"* * * A lunacy proceeding is a civil as distinguished from a criminal proceeding; yet it is a proceeding in personam by the State; the public is interested in the welfare of the person alleged to be insane. * * *

Depositions are admissible in sanity proceedings as they are in other civil cases. See State v. Dickman, 175 Mo. App. 543, 1.c. 553, where the Court says:

"* * * We have in our State only two ways by which testimony may be 'heard;' one ore tenus; the other by deposition. Testimony given by either mode is lawful. The law recognizes no distinction between them. Section 6384 gives any party to a suit pending in any court of this State the right to obtain testimony

Honorable LeRoy Snodgrass

of witnesses to be used in such suit, conditionally. This is as broad as language can make it. If, then, there is a suit pending and the informant is a party to it, the right to take depositions is given as fully and as broadly at least by necessary implication, as is the power to produce witnesses and introduce testimony. In no case before our courts that has been reported, is it suggested that it was not within the power of the informant to summon witnesses to attend the inquiry. That right has always been recognized as in the informant. * * *

Inasmuch as depositions are admissible in sanity hearings the court, of course, could base its opinion as to the sanity or insanity of a person on those depositions. The depositions, of course, should be properly taken so as to eliminate any question as to the identity of the deponent and as to the identity of the person who wishes to be restored.

There is no necessity for the presence of the insane person at the hearing; he should, of course, be given an opportunity to attend the hearing, but if due notice and opportunity to attend are extended, the presence of the alleged insane person is not essential. See *In re Moynihan*, 62 S.W. 2d 410.

The next question presented by your letter is the question as to what provisions, if any, there are for the payment or presence of an attorney or representative of the state to be at the taking of out-state depositions in sanity cases. First of all, the State has an interest in sanity hearings and restoration proceedings. This interest arises out of the possibility of the insane person squandering his estate and becoming a charge on the public purse and, further, a general superintending control is necessary for the protection of the public and of the insane person.

See *State vs. Skinker*, 126 S.W. 2d 1156, 1.c. 1161, where the court said:

" * * * But it is also true that in these lunacy-proceedings, the state, as parens patriae, the community, --society--has an interest, both to protect the insane person and to protect the public from possible injury and to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public. * * *

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The prosecuting attorney is, of course, required to represent the state and county under Section 56.060, RSMo 1949, which reads as follows:

"Duties--general--in changes of venue--on appeal.

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

With regard to the prosecutor's duties, also see Sections 56.070, 56.080, and 56.090, RSMo 1949. Inasmuch as a sanity case is a civil case in which the state has an interest and the prosecuting attorney represents the state in civil cases, we feel that the prosecuting attorney should represent the state in sanity cases. There is no statutory authority, for allowing prosecuting attorneys of smaller counties expenses for travel. The courts have held, however, that an allowance for stenographic help is proper. In this regard see the case of *Rinehart v. Howell County*, 153 S.W. 2d 381, 1.c. 383, subsection 5, which reads:

Honorable LeRoy Snodgrass

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. * * *

This office, on January 23, 1947, gave an opinion to James L. Paul, prosecuting attorney of McDonald County, which concluded as follows:

"Prosecuting attorneys may be reimbursed for actual and necessary traveling expenses in the investigation of crimes and the county court is authorized to provide such expenses."

We enclose a copy of this opinion and we see no reason why the county court should not be authorized to provide necessary traveling expenses for the investigation and preparation of civil cases in which the county has an interest. It must be said, however, in this regard that public moneys are trust funds insofar as public officers are concerned and that care must be used in authorizing their expenditure. County courts are invested with discretion in the matter of the expenditure of public money for prosecuting attorney's expenses. See the case of Bradford v. Phelps County, 210 S.W. 2d 996, at l.c. 1000, where the court said:

"* * * This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the

Honorable LeRoy Snodgrass

expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government: To put it in another and summary way--since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."

This opinion should not be taken as authority for extensive trips for prosecuting attorneys in every case where there is an out-of-state witness in an insanity hearing. Every case, of course, must be judged on its own merits, and the question to be decided by the county court before they authorize the prosecuting attorney's out-state travel expense is whether or not the public interest in the case is great enough to justify the expenditure of such an amount of public money in its preparation. In a proper case where the interest of the public, in the opinion of the county court, justifies the expense, travel expenses of the prosecuting attorney may be paid out of the county coffers for out-of state trips to take depositions in insanity cases.

CONCLUSION

A person who is now a nonresident but who has properly been declared insane by a Missouri court can apply to the probate court in the county in which he was adjudicated insane for restoration of his sanity, he need not be personally present on the date of

Honorable LeRoy Snodgrass

the hearing and he may have depositions, properly taken, introduced as evidence in the case. The county court, if they believe that the expenditure of public funds is justified by the magnitude of the public interest in the case, may pay the prosecuting attorney's travel expense out of state to take depositions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James E. Conway.

Very truly yours,

John M. Dalton

JEC:gm

Enclosure - Opn. to James L. Paul
1-23-47

SALES TAX: A contractor who makes permanent installations of personal property into real estate is not required to collect 2% sales tax for the materials used in the installation. Further, where a contractor purchases tangible personal property from a subcontractor or a material man 2% sales tax must be paid.



January 15, 1958

Honorable Tom A. Stapleton, Supervisor
Sales Tax Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Stapleton:

This is in reply to your request for an opinion from this office as follows:

"In accordance with a recent telephone conversation between you and Mr. Milton Carpenter, this department respectfully requests an official opinion relative to the following:

"A contractor accepts a contract from an individual to modify and to make certain physical changes in a building owned by an individual.

"The contractor in turn subcontracts a portion of the original contract.

"The portion of the contract subcontracted calls for the subcontractor to furnish all labor, materials, equipment and services necessary to fabricate and deliver to the job site certain doors, frames and window settings. In this situation, the prime contractor would install the finished items mentioned above.

"Would in this situation, the subcontractor be correct when billing the prime contractor to include a 2 percent

Honorable Tom A. Stapleton

charge for Missouri sales tax, remembering the subcontractor would not install the items, but delivers the finished items to job site for the prime contractor.

"When a contractor subcontracts a portion of an original contract as referred to above and the subcontractor is required to install the items in the building, would the subcontractor when billing the prime contractor include a 2 percent charge for the Missouri sales tax, remembering the subcontractor delivers the finished items and installs the items for the prime contractor.

"In the event that the same situation prevails in each of the above two questions, would the interpretation be the same if the subcontractor was classed as a retailer; that is, he has been and is using a sales tax code assigned by this division."

It is noted in your letter that the first question asked involves a situation where a subcontractor furnishes all labors, materials, equipment and services necessary to fabricate and deliver to the job site certain doors, frames and window settings. In this situation this material is then taken from the subcontractor and installed by the prime contractor.

In regard to the problem involved here, it is thought that a pertinent rule has been established in the case of City of St. Louis v. Smith, 114 S.W. 2d 1017, wherein at 1. c. 1019 the Supreme Court of Missouri considered Section 2, Laws of Missouri, 1935, page 415, now contained in the Missouri Sales Tax Law, in Sections 144.020 and 144.010, RSMo 1949, it was stated:

" 'From and after the effective date of this Act and up to and including December 31, 1937, there shall be and is hereby levied and imposed and there shall be collected and paid:

" '(a) Upon every retail sale in this

Honorable Tom A. Stapleton

state of tangible personal property a tax equivalent to one(1) per cent. of the purchase price paid or charged.'

"Section 1 of the act (Laws 1935, p. 413) defines a 'retail sale' as follows: 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration.' "

It is further stated at l. c. 1019 as follows:

"[1] It is clear from these statutory provisions that where one buys tangible personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax. In this case, the contractors agreed with the city to furnish all labor and material necessary to construct, and to construct, the improvement in question for a fixed sum of money. It was necessary for the contractor to purchase and use all material necessary to complete said work in order to be in a position to deliver to the city a completed structure as provided in the contract. Our judgment is that it cannot be said by the contractor that he resold the materials to the city for its use, and did not use or consume them in the performance of his contract. * * * "

There has been no substantial change between the statutes quoted above and their present counterparts, which will be found as subsection 1 of Section 144.020, RSMo 1949, and paragraph 8 of subsection 1 of Section 144.010, RSMo 1949.

In the Smith case, supra, the court, at l. c. 1019,

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quoted from Ruling Case Law as follows:

"In 23 R.C.L. p. 1233, § 49, the law is thus stated: 'A contract to do certain work on a building and to supply the requisite material is not a contract of sale of such material within the statute of frauds; so a contract to furnish material, and, after performing labor thereon, attach it to the realty, as a part of the building in the course of construction, is not a sale of goods or chattels.' "

In construing the above quotation in regard to the point involved, it was then stated, l. c. 1019-1020, as follows:

"[2] In our judgment the contractors in this case did not buy the materials in question for the purpose of re-selling such materials to the city. They were under contract to deliver to the city a finished product. It was the inseparable commingling of labor and material that produced the finished product; Our conclusion is that the contractors used and consumed the material in order to produce the finished product in compliance with their contract. Since the contractors used and consumed the material, they and not the city are primarily liable for the one per cent. sales tax. The sale of the materials by the dealer to the contractors was the taxable transaction, and it was the duty of the dealer to collect the tax from the contractors at the time the sale was made."

It is believed that the law stated above is authority for the statement that, if a subcontractor sells tangible personal property to a contractor who uses and consumes the property in the erection of buildings constituting real estate, the payment of 2% sales tax is required under the law to be paid by the prime contractor to the subcontractor. On the other hand, if a subcontractor furnishes all labor,

Honorable Tom A. Stapleton

materials, equipment and services necessary to fabricate certain doors, frames and window settings and installs them permanently to real estate, it is believed that there is no liability on behalf of the contractor or the subcontractor for sales tax upon this transaction.

In the case of State ex rel. Otis Elevator Co. v. Smith, 212 S.W. 2d 580, at l. c. 582, it was stated by the Supreme Court as follows:

"We are unable to follow the latter part of this reasoning. If the materials have the legal status of tangible personal property when the title passes, they are subject to sales tax. On the other hand, if by the act of attaching them to the real estate they are converted into realty and the title passes to the landowner they will not be subject to the tax because it does not go against real estate. * * *"

In answer to the last question in regard to the effect upon the application of the law to the transactions involved, in the event the subcontractor is classed as a retailer, an answer appears unnecessary, inasmuch as the same situation does not prevail in the two above questions.

In subsection 8 of Section 144.010, RSMo 1949, the following definition of a sale at retail is stated:

"(8) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; * * *."

Sales tax liability attaches in accordance with subsection 1 (1), Section 144.020, RSMo 1949, which appears in pertinent part in the quotation from the case of City of St. Louis v. Smith, supra. The definition of business is stated in Section 144.010 of the Sales Tax Law as including any activity engaged in by any person, or caused to be engaged in, with the object of gain, benefit or

Honorable Tom A. Stapleton

advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of this chapter. It is, therefore, thought that it would make no difference as to whether a contractor is a retailer or wholesaler, in the event the transaction in which he is engaged is such a transaction that is taxable under the sales tax law.

CONCLUSION

Therefore, it is the opinion of this office that a contractor who makes permanent installations of personal property into real estate is not required to collect 2% sales tax for the materials used in such installation. It is further the opinion of this office that where a contractor purchases tangible personal property from a subcontractor or a material man, 2% sales tax must be paid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Paris.

Very truly yours,

John M. Dalton
Attorney General

JWF:ld:lc

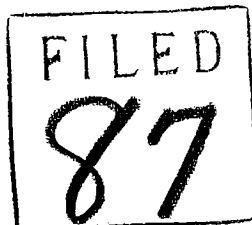
OPTOMETRY:
REGULATIONS:

Validity of Proposed Regulations.

January 20, 1958

Filed: #87

Missouri State Board of Optometry
Dale P. Summers, O. D., President
200 Guitar Building
Columbia, Missouri



Gentlemen:

This will acknowledge receipt of your request for an opinion to pass upon the validity of the following proposed rules which the Missouri State Board of Optometry plans to promulgate in the very near future. The proposed rules are as follows:

"1. An optometrist shall be deemed to be advertising, practicing or attempting to practice under a name other than his own name if he permits, allows or causes any advertisement of eyeglasses or optometric services to be published that gives greater prominence in said advertisement to the name of a person, who is not a registered optometrist or physician or surgeon, than it gives to the individual name of the optometrist.

"2. It shall be deemed 'dishonorable conduct in optometric practice' for an optometrist to permit, allow or cause a person, who is not a registered optometrist or a licensed physician or surgeon, to use said optometrist's prescription, or optometric findings to fit contact lenses upon a patient or member of the public.

"3. It shall be deemed 'dishonorable conduct in optometric practice' for an optometrist to enter into an agreement or arrangement whereby he permits, allows or causes a person, who is not a registered optometrist or a licensed physician or surgeon, to do any one or any combination of the following acts upon a patient or member of the public:

"1) examine the eye to ascertain the presence of defects or abnormal conditions of the eye;

"2) take an impression mold of the eyeball;

"3) determine the corrective qualities to be incorporated in a contact lens; or

"4) adjust or fit a contact lens to the eye.

"4. It shall be deemed a combination of advertising by means of knowingly deceptive statements', 'advertising, practicing or attempting to practice under a name other than one's own', 'advertising, directly or indirectly prices or terms for optometric services', and 'dishonorable conduct in optometric practice' by 'employing what is known as procurers to obtain business', within the meaning of Section 336.110 (5), (6), and (7), Revised Statutes of Missouri, 1949, for a registered optometrist to enter into an agreement or arrangement with any person, firm or corporation that advertises prices or terms for eyeglasses, ophthalmic lenses or frames, whereby said optometrist:

"1) Leases space from such person, firm or corporation; or

"2) Uses, in his optometric practice, optical equipment, instruments, fixtures, furniture and furnishings owned or furnished by such person, firm or corporation; or

"3) Receives a guaranty of income in his optometric practice from such person, firm or corporation; or

"4) Receives reimbursement for business expenses, incurred in his optometric practice, from such person, firm or corporation."

In view of the fact your request relates to the authority of said Board to promulgate certain rules and regulations in administering the provisions of Chapter 336, RSMo 1949, we deem it advisable to first determine your statutory authority to make rules and regulations and, further, if you are vested with such authority, just how far can said Board proceed in adopting rules and regulations.

We find a very thorough discussion in Volume 73, C.J.S. Section 95, page 416-417, on just how far a public official may go in promulgating rules and regulations and reads, in part:

"A public administrative officer ordinarily has authority to make or promulgate such rules and regulations as may aid in enforcing or carrying into effect the law or statute which he is administering. The measure of his power is the amount adequate for the purpose for which it was delegated, and his discretion in promulgating regulations depends, to some extent, on the subject matter of the legislation which he is attempting to implement. In exercising his power to make or adopt rules and regulations a public administrative officer should not go beyond the authority vested in him, nor may he regulate matters expressly taken or removed from his supervision by the legislature. He may make or adopt only rules and regulations which will carry into effect the will of the legislature as expressed by the statute, and he may not enact a law under the guise of making an administrative rule or regulation."

Section 336.160, RSMo 1949, specifically vests in said Board authority to make rules and regulations within the scope and terms of Chapter 336, RSMo 1949, relating to licensing and administration of optometrists in this state.

Any such regulations that may be adopted by your Board shall take effect not less than ten days after same are duly filed in the office of Secretary of State (Sec. 16, Art. IV, Constitution of Mo.).

We shall consider the proposed regulations in the order stated in your request.

The regulations are based upon the provisions found in Section 336.110, RSMo 1949, which reads, in part:

"1. The state board of optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes:

"(1) Conviction of a felony, as shown by a certified copy of the record of the court of conviction;

"(2) The obtaining of or an attempt to obtain, a certificate of registration or practice in the profession or money or any other thing of value by fraudulent misrepresentation;

"(3) Malpractice;

"(4) Continued practice by a person knowingly having an infectious or contagious disease;

"(5) Advertising by means of knowingly false or deceptive statements;

"(6) Advertising, practicing or attempting to practice under a name other than one's own;

"(7) Advertising, directly or indirectly, prices or terms for optometric services;

"(8) Gross ignorance, gross inefficiency, or dishonorable conduct in optometric practice. Dishonorable conduct in optometric practice shall include, but shall not be limited to, employing what is known as procurers to obtain business; and the obtaining of any fee by fraud or misrepresentation;

"(9)(9) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs;"

The first rule to be adopted is evidently to prevent one licensed to practice optometry from advertising the practice of optometry in the name of another person not licensed to practice optometry.

This does not present the question of a licensed optometrist in this state carrying on his profession entirely under the name of another, but in a combined effort, not only in the licensee's name, but to advertise under both names.

The decisions clearly hold under similar statutes that a licensed optometrist advertising under the sole name of another is doing so in violation of the law. Winslow vs. Kansas State Board of Dental Examiners, 115 Kan. 450, 223 P. 308; State vs. Kindy Optical Co., 216 Iowa 1157, 248 N.W. 332.

It has been held that statutes regulating not only optometric practice, but other similar practices, are enacted for the purpose of aiding public health and the benefit was intended for the public, and not particularly for the optometrist or other professional licensees.

Therefore, we conclude that such advertising, including both the name of the licensed optometrist and the name of the unlicensed person, would be in violation of Section 336.110, subsection 6, RSMo 1949, and said proposed regulation properly follows the law and is a valid regulation.

Your second request is concerning the validity of the proposed regulation No. 2. Dishonorable conduct is defined in part, but not entirely, under Section 336.110, supra, as follows:

" * * * Dishonorable conduct in optometric practice shall include, but shall not be limited to, employing what is known as procurers to obtain business; and the obtaining of any fee by fraud or misrepresentation;"

The action complained of in the foregoing proposal does not constitute the employment of procurers or obtaining a fee by fraud or misrepresentation.

In determining whether such action, at which said regulation is leveled, may be dishonorable conduct, we are not limited to the definition given in the foregoing statute for said definition specifically provides that it shall not be limited thereto. Therefore, we shall examine decisions construing dishonorable conduct. In *State Board of Dental Examiners vs. Bohl*, 174 P. 2d 998, 1001, 162 Kan. 156, the court held dishonorable conduct as respects dentistry, is that conduct opposed to the long-standing codes of ethics of the profession. In *Crabb vs. Board of Dental Examiners*, 235 P. 829, a statute for construction provided for the State Board to refuse or revoke licenses for certain specified causes and concluded "or for any other dishonorable conduct." Such grounds for refusing or revoking said license did not specifically include that of being drunk or intoxicated in public places or driving an automobile while under the influence of intoxicating liquor. Said complaint was filed against said licensed dentist of being drunk and also operating a motor vehicle while under the influence of intoxicating liquor. He pleaded guilty and paid fines. Thereafter, due notice was given said dentist to appear before the State Board of Dental Examiners for a hearing on his conduct.

The court in construing said statute concluded that the rule of *ejusdem generis* is not of itself a rule of interpretation, but only to interpret and must always yield to the manifest legislative intent. At said hearing said licensee again plead guilty to such acts complained of, however, he contended that it was not grounds for revocation of his license. The court held that such action did constitute dishonorable conduct and in sustaining the action of the Board in revocation of said license said, l. c. 829, 830:

"The contention of the plaintiff is that the Legislature, in enumerating the two specific grounds for refusing a license or revoking one that had been issued and adding the general words 'for any other dishonorable conduct,' intended that the general words should be restricted and include only conduct of the classes specifically mentioned, and that it must be conduct connected with the profession of dentistry or the practice thereof. The rule of ejusdem generis is invoked, and that rule is applicable where there is doubt as to the intention of the Legislature, but it is not of itself a rule of interpretation, but only an aid to interpretation, and must always yield to the manifest legislative intent. State v. Prather, 79 Kan. 513, 100 P. 57, 21 L.R.A. (N.S.) 23, 131 Am. St. Rep. 339. It will be observed that the specific terms of the statute refer to different and unrelated subjects. One of them is the obtaining of money or other thing of value by false and fraudulent representations which would include offenses or conduct not necessarily connected with the practice of dentistry. The other, which is practicing under a name other than his own, has relation to the practice. It appears that the two kinds of misconduct are materially different, and it has been held that when the specific words or subjects greatly differ from one another, the doctrine does not apply. Where such disparity exists, the general words are not restricted, but are to be given their natural and wider meaning. Brown v. Corbin, 40 Minn. 508, 42 N.W. 481; McReynolds v. People, 230 Ill. 623, 82 N.E. 945; State v. Eckhardt, 232 Mo. 49, 133 S.W. 321.

"We think that drunkenness in the circumstances stated involved dishonorable conduct, and that one who is drunk is unfit for the practice of dentistry. One in that condition has not the normal control of his physical and mental faculties. His judgment and fitness for professional work is not only impaired, but the charges to which the plaintiff has confessed constituted public offenses. * * * * *

Certainly, if such action constitutes dishonorable conduct under such statute when such action was not directly related at all times to his ability to practice his profession, then such proposed regulation is valid.

This Department rendered an opinion to the then Secretary of the Missouri State Board of Optometry under date of January 6, 1947, holding that such functions can only be performed by a registered optometrist or surgeon licensed to practice in this state. In view of the foregoing, we must conclude that said regulation is valid.

In replying to your third request to pass on the validity of proposal No. 3, we are of the opinion that the foregoing opinion rendered by this Department, and referred to in our answer in passing on the validity of the proposed second regulation, is sufficient to hold that the third proposal is valid.

We shall next consider your regulation No. 4. It is well established that a rule or regulation should be so clear that anyone interested should be able to determine his rights or exemption thereunder, and necessarily must follow the law that is being administered, otherwise it would amount to legislating. We have carefully examined said proposal and to say it is ambiguous is putting it mild. We find a very well established general principle of law applicable to construction of all rules and regulations, which reads in part, Vol. 73 C. J. S. Sec. 100, p. 418:

"A rule or regulation of a public administrative body or officer should be definite and, likewise, such rule or regulation should be certain. It should not be subject to the objection that it fails to lay down adequate legislative standards, since it must contain a guide or standard applicable alike to all individuals similarly situated so that anyone interested may be able to determine his own rights or exemptions thereunder. Moreover, an administrative rule or regulation should not violate a constitutional provision to the effect that no law shall pass which refers to more than one subject matter or which contains matter different from what is expressed in the title thereof."

See also in Druzik vs. Board of Health vs. Haverhill, 85 N.E. (2d) 232, 324 Mass. 129.

We are cognizant of the fact that said Board under Section 336.110, supra, may refuse to renew, may suspend, or revoke, any certificate of registration of anyone, or combination of causes enumerated under the various subsections of the foregoing statute. However, it appears that you have attempted to make this one regulation all-inclusive to cover the greater proportion of the field of violations under the optometry law in this state. It is possible that some kind of revision in said proposal may cure any ambiguity so as to bring it within the law and constitute a valid regulation.

In the present form we cannot help but be of the opinion that a court would declare it invalid. Therefore, we conclude that proposed regulation No. 4 is not a valid regulation.

CONCLUSION

It is the opinion of this Department that regulations No. 1, 2, 3, as set out in your request, when properly filed with the Secretary of State, as provided in Section 16, Article IV, Constitution of Missouri, will constitute valid regulations. It is our further opinion that your last proposed regulation No. 4 is too ambiguous and we must hold it invalid.

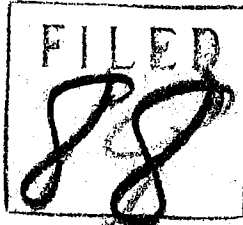
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw/om

EMPLOYMENT SECURITY: J. E. Taylor, Director, authorized to requisition funds from federal Unemployment Trust Fund.



March 14, 1938

Honorable J. E. Taylor
Director, Division of
Employment Security
Department of Labor and
Industrial Relations
Jefferson City, Missouri

Dear Mr. Taylor:

We have received your request for an opinion of this office, which reads as follows:

"According to the requirements of the Director of Employment Security, Department of Labor, and the Fiscal Service of the Treasury Department, a certification by the Attorney General with respect to my appointment as Director of the Division of Employment Security of the Department of Labor and Industrial Relations, is required in accordance with the following:

'Treasury Department Requirements for Withdrawals From the Unemployment Trust Fund. In order that State agency requisitions for moneys from the unemployment trust fund may be honored by the Treasury Department, whenever the status of the person or persons previously certified has changed, the Treasury Department requires that the following must be submitted directly to it:

'A. An original, signed opinion or certification by the attorney general of the State, or a certified copy thereof,

Honorable J. E. Taylor

that the individual over whose signature the requisitions are made has duly constituted authority under the State law and under resolution of the State agency, if required by law or regulation, to make such requisitions. If such qualified individual delegates his authority to requisition funds from the unemployment trust fund, the opinion shall contain reference to the authority for such delegation of power.'

"The provision relating to requisitioning funds from the Missouri Account in the Federal Unemployment Trust Fund will be found in Section 288.290.4, RSMo 1957 Supplement, page 789.

"I respectfully request that you supply me the opinion or certification required by Paragraph A above."

Section 288.290, subparagraph 4, Mo. R.S., 1957 Cum. Supp., provides, in part:

"4. Moneys shall be requisitioned from the Missouri account in the federal unemployment trust fund solely for the payment of benefits or for refunds of contributions in accordance with regulations prescribed by the director, except that money credited to this state's account pursuant to section 903 of the Social Security Act (42 U.S.C.A. §1104), as amended, shall be used exclusively as provided in subsection 5. The director shall from time to time requisition from the federal unemployment trust fund such amounts, not exceeding the amounts standing to the Missouri account therein, as he deems necessary for the payment of benefits and refunds for a reasonable future period. * * *"

Section 288.220, Mo. R.S., 1957 Cum. Supp., provides, in part, as follows:

Honorable J. E. Taylor

"1. The division of employment security of the department of labor and industrial relations shall be under the control, management and supervision of a director who shall be appointed by the governor, by and with the advice and consent of the senate. Such director shall be a citizen and qualified voter of this state, and he shall serve at the pleasure of the governor. He shall be paid a salary of ten thousand dollars per year from the unemployment compensation administration fund."

By virtue of the above statutory provisions, the person authorized to make requisitions for withdrawals on behalf of the State of Missouri from the Unemployment Trust Fund is the Director of the Division of Employment Security. In our opinion, you are now the person legally holding that office by virtue of your appointment by the Governor of the State of Missouri and the confirmation of such appointment by the Missouri Senate.

The State Senate of the State of Missouri received, on March 4, 1958, a message, in writing, from J. T. Blair, Jr., Governor of the State of Missouri, while the State Senate of Missouri was in session in the 69th General Assembly of the State of Missouri, informing the Senate that he had appointed J. E. Taylor, Jefferson City, Cole County, Missouri, Director of the Division of Employment Security of the Department of Labor and Industrial Relations for the State of Missouri for a term ending at the pleasure of the Governor of Missouri and requesting the consent to, and approval of, such appointment by the State Senate (Senate Journal, 69th General Assembly, Second Extra Session, page 94).

Such appointment of J. E. Taylor was by the State Senate of the State of Missouri, in session on March 11, 1958, approved and confirmed, and the Governor was by the State Senate of the State of Missouri so notified thereof in writing.

Thereafter, in conformity with such confirmation by the State Senate of said appointment, James T. Blair, Jr., Governor of the State of Missouri, did appoint and commission the said J. E. Taylor as Director of the Division of Employment Security of the Department of Labor and Industrial Relations of Missouri for a term ending at the pleasure of the Governor. Pursuant

Honorable J. E. Taylor

to Section 28.060, RSMo 1949, the abstract of said commission is recorded in Civil Register No. 5, page 194, of the Official Records of the Secretary of State of Missouri.

On March 12, 1958, J. E. Taylor took the oath of office as Director of the Division of Employment Security of the Department of Labor and Industrial Relations and entered upon the performance of the duties of that office, and now duly holds the same.

CONCLUSION

It is therefore the opinion of this office that J. E. Taylor, Director of the Division of Employment Security of the Department of Labor and Industrial Relations of the State of Missouri, is the person who has duly constituted authority under the laws of the State of Missouri to make requisitions for moneys from the Unemployment Trust Fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

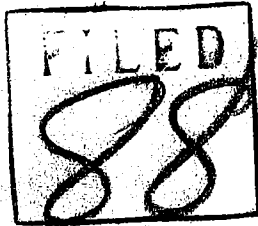
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

SCHOOLS:
SCHOOL BUSES:
EMPLOYMENT SECURITY:
MOTOR VEHICLES:

Use of school buses to transport agricultural day-haul workers under Employment Security Program.



November 13, 1958

Honorable J. E. Taylor
Director, Division of
Employment Security
Jefferson City, Missouri

Dear Mr. Taylor:

This refers to your letter of October 15, 1958, requesting an opinion from this office, which letter reads as follows:

"The Federal Bureau of Employment Security, Washington, D. C., has requested us to obtain from your office an opinion on the use of school buses for transporting agricultural day-haul workers.

"In the employment security program it is often necessary to transport agricultural workers in groups to and from work by a hired driver. This is the practice in the cotton producing section, the commercial vegetable growing section and the corn de-tasseling section of the state.

"Workers are assembled at a certain point and someone with a truck or other means of conveyance picks them up to go to work. The driver, who may also be the owner of the truck or other conveyance, may or may not be an agricultural worker and may or may not stay all day with the workers, but will return them from the place of work to the point of pick up.

"The Bureau is requesting us to obtain from your office an opinion as to whether school buses can be used for transporting agricultural day-haul workers and, if so, under what conditions."

Honorable J. E. Taylor

Your letter does not distinguish between privately-owned buses which are used to transport school children under contracts between the bus owners and school districts and buses which are owned by school districts; and, therefore, we shall deal with both types of buses in this opinion.

In the case of privately-owned buses which are used in the transportation of school children under contracts with school districts, we find nothing in the Missouri statutes which prohibits the use of such buses for purposes other than the transportation of school children; and, in fact, a requirement contained in Section 304.075, RSMo Cum. Supp. 1957, hereinafter quoted, expressly recognizes that the buses may be used for other purposes. Accordingly, we are of the opinion that such buses may be used to transport agricultural day-haul workers in connection with the Employment Security Program, provided that such use is not prohibited by the contracts between the bus owners and the school districts and does not interfere with the performance of such contracts.

In the event that a bus is so used, it would cease to be a "school bus" for licensing purposes and it would be necessary for the bus to be licensed in the same manner as though it were not used for the transportation of school children. It would also be necessary for the owner of the bus to comply with a requirement of Section 304.075, RSMo Cum. Supp. 1957, relating to the covering of signs on school buses, which reads as follows:

"* * * When any person operating a school bus under contract with a school district uses it for purposes other than for the transportation of school children, he shall cover the signs thereon in such manner that it will not appear on the highways as a school bus. * * *"

We next consider the situation with respect to the use of school district-owned buses for the purpose mentioned in your letter. In an opinion furnished by this office to William L. Hungate, on August 29, 1953, a copy of which is enclosed, we concluded that a school district had no authority to transport children to a private school even though the cost of transportation might be paid by the children so transported. That opinion was based upon the fact that, in accordance with the authorities cited in the opinion, school districts have only such powers as are conferred by statute or such as may be reasonably implied as necessarily incident to a power expressly conferred, and the fact that there was

Honorable J. E. Taylor

no statutory authorization for a school district to enter into a contract of the kind under consideration in that opinion.

We find no statutory authorization for a school district to provide transportation for agricultural day-haul workers or to enter into any contract under which district-owned buses would be used for that purpose. Accordingly, it is our opinion that such action by a school district would be beyond the powers of the district. While it is not necessary to our opinion, we also note that, as in the case of privately-owned buses, such use of a district-owned bus licensed solely as a school bus would be in violation of the licensing requirements of our state statutes.

CONCLUSION

It is the opinion of this office that privately-owned buses which are used in the transportation of school children under contracts between the bus owners and school districts may be used for the transportation of agricultural day-haul workers in connection with the Employment Security program, provided that (1) such use is not prohibited by, and does not interfere with the performance of, the contracts with the school districts, (2) the buses are properly licensed for such use, and (3) the bus owner complies with the requirement of Section 304.075, RSMo Cum. Supp. 1957, relating to the covering of signs on the buses. With respect to district-owned school buses, it is our opinion that such buses cannot be legally used for the transportation of agricultural day-haul workers.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Baumann.

Yours very truly,

John M. Dalton
Attorney General

Enc. (1)
JCB:am

COUNTIES: County court in county of third class may
not invest funds in United States Government
COUNTY COURT: securities except surplus in sinking and
interest fund and county and township school
funds.



April 1, 1958

Honorable Geo. S. Thompson
Prosecuting Attorney
Chariton County
Salisbury, Missouri

Dear Mr. Thompson:

This is in response to your request for opinion dated
March 12, 1958, which reads as follows:

"The county court of Chariton County, Missouri has requested that I obtain an Attorney General's opinion as to whether or not a county court of a third class county has the authority to invest county surplus general revenue funds in short term U. S. Government securities. Such surplus funds are available after the township collectors turn in their receipts and such surplus continues to exist until the last few months of each calendar year.

"I have noted that Article VI, Section VII of the Missouri 1945 Constitution provides that the county court shall manage all county business as prescribed by law. Section No. 50.680, V.M.S. 1949, provides for the classification of proposed expenditures. I am unable to locate any statute which specifically authorizes investment of county funds other than Section No. 50.040 which provides that a county court may invest school funds to purchase outstanding county revenue warrants."

Honorable Geo. S. Thompson

Article VI, Section 7, Constitution of Missouri, 1945, provides that in each county not framing and adopting its own charter or adopting an alternative form of county government "there shall be elected a county court of three members, which shall manage all county business as prescribed by law, * * *." (Emphasis ours.)

It has been held on numerous occasions that the county court, as the fiscal agent of the county, is not the general agent of the county but may exercise only those powers expressly granted by statute or such as are necessary to carry out and make effectual the purposes of the authority expressly granted. *King v. Maries County*, 297 Mo. 488, 249 SW 418; *Bradford v. Phelps County*, 357 Mo. 830, 210 SW2d 996.

County courts are given express authority to invest the county and township school funds (Chap. 171, RSMo 1949, and Cum. Supp. 1957; Section 50.040, RSMo 1949) and may also invest any surplus in the sinking and interest fund as provided in Section 108.200, RSMo 1949. However, with regard to the general revenue of the county, the only legislative directive is that contained in Chapter 110, RSMo 1949, and Cum. Supp. 1957, providing for the selection of a county depository and the deposit of the county funds therein.

It is significant to note that in Section 110.170, RSMo 1949, the Legislature deemed it necessary to provide expressly that "nothing in sections 110.130 to 110.260 shall be construed to prevent county courts from lending the capital school funds of townships or of the county according to law."

Since county courts are agents of limited powers (*Huntsville Trust Co. v. Noel et al.*, Mo. Sup., 12 SW2d 751, 754) and express authority is given them to invest certain funds, i.e., county and township school funds and a surplus in the sinking and interest fund, it was evidently the intention of the Legislature that no other funds of the county be invested in any manner, but that they be placed in the county depository.

CONCLUSION

It is the opinion of this office that the county court in a county of the third class may not invest any of the funds

Honorable Ge. S. Thompson

under its control in short-term United States Government securities except a surplus in the sinking and interest fund and county and township school funds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

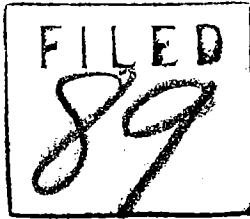
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

CONSTITUTIONAL LAW:
APPROPRIATIONS:

Secs. 4.510 and 4.520 of S.C.S.H.C.S.H.B. No. 4,
69th General Assembly, Second Extra Session,
appropriating monies for personal services for
employees of Missouri Conservation Commission, but excepting salary
increases, violates Sec. 23, Art. 3, Mo. Const. 1945, as appropriation
measure containing legislation. Unconstitutional portion may be elimin-
ated without causing both sections to fall.



May 29, 1958

Honorable William E. Towell, Director
Missouri Conservation Commission
Monroe Building
Jefferson City, Missouri

Dear Mr. Towell:

This opinion is rendered in reply to your inquiry reading as follows:

"Sections 4.510 and 4.520 of Senate Committee Substitute for House Committee Substitute for House Bill No. 4, as passed by the 69th General Assembly and signed by the Governor, contain appropriations for the Conservation Commission for the period beginning July 1, 1958 and ending June 30, 1959. The first named Section is appropriation of monies from the Conservation Commission Fund; while Section 4.520 is from the General Revenue Fund specifically for forestry purposes. An additional appropriation for capital improvements from the Conservation Commission Fund is contained in House Bill No. 11.

In House Bill No. 4, after the item Personal Services, the Legislature has inserted the words "except salary increases." I have been informed by the State Comptroller that without an official opinion from your office, or a court decision to the contrary, he cannot certify a payroll containing salary increases for this department after July 1, 1958. Section 42 of Article IV of the Constitution of Missouri states that the Conservation Commission shall fix the salaries of its employees.

On behalf of the Conservation Commission, I respectfully request an official opinion from your office as to the legality of this legislative action. This opinion is requested both

Honorable William E. Towell

with reference to the Conservation Commission Fund in Section 4.510 and the General Revenue Fund in Section 4.520."

The appropriation measure referred to in the above request for this opinion must be a reference to the appropriation measure of identical description passed at the Second Extra Session of the 69th General Assembly of Missouri.

Section 4.510 of the appropriation measure being considered is in the following language:

"There is appropriated out of the State Treasury, chargeable to the Conservation Commission Fund, including but not limited to funds received from federal or other cooperating agencies for wild-life and forest conservation, Four Million Eighty-two Thousand Sixty-four Dollars (\$4,082,064), for the use of the Conservation Commission, for the period beginning July 1, 1958 and ending June 30, 1959, as follows:

Personal Service except salary increases.....	\$2,427,064
Additions.....	155,000
Repairs and Replacements.....	330,000
Operation.....	<u>1,170,000</u>
Total from Conservation Commission Fund.....	\$4,082,064"

Section 4.520 of the appropriation measure being considered is in the following language:

"There is appropriated out of the State Treasury, chargeable to the General Revenue Fund, Three Hundred Thousand Dollars (\$300,000), for the use of the Division of Forestry, for the period beginning July 1, 1958 and ending June 30, 1959 as follows:

Personal Service, except salary increases.....	\$ 55,120
Additions.....	55,270
Repairs and replacements.....	64,610
Operation.....	<u>125,000</u>
Total from General Revenue Fund.....	\$300,000"

Honorable William E. Towell

Section 42, Article 4, Missouri's Constitution of 1945, in treating of the personnel of the Conservation Commission of Missouri, provides:

"The commission shall appoint a director of conservation who, with its approval, shall appoint the assistants and other employees deemed necessary by the commission. The commission shall fix the qualifications and salaries of the director and all appointees and employees, and none of its members shall be an appointee or employee."

The self-enforcing character of the constitutional provisions quoted above is reflected in the following language of Section 44, Article 4, Missouri's Constitution of 1945:

"Sections 40-43, inclusive, of this article shall be self-enforcing, and laws not inconsistent therewith may be enacted in aid thereof. All existing laws inconsistent with this article shall no longer remain in force or effect."

Section 23, Article 3, Missouri's Constitution of 1945, provides:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

The foregoing constitutional provision dealing with the subject and title of legislative acts reflects a change in form but not in substance from Section 28, Article 4, Missouri's Constitution of 1875, the latter provision having been construed by the Supreme Court of Missouri on several occasions. As a result of these decisions, it is well established in this State that the General Assembly cannot legislate by an appropriation act.

Did the 69th General Assembly of Missouri, in its Second Extra Session, attempt to improperly legislate in the appropriation measure in question by appropriating for "Personal Service, except salary

Honorable William E. Towell

increases," as such language is found in Sections 4.510 and 4.520 of Senate Committee Substitute for House Committee Substitute for House Bill No. 4?

A case disclosing facts bearing close analogy to the facts on which this opinion is based is State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338, and it will be relied upon to rule the inquiry in this instance. In the Thompson case, supra, an appropriation measure was being considered which contained a section reading as follows:

"Sec. 100. Salary - how determined. - No salary for any official or employee, either elective or appointive, provided for by this appropriation act, shall be in excess of the salary provided by statutory law for such official or employee, and in all cases where the salary of any such official or employee is not definitely fixed by statutory law, no salary paid by virtue of this appropriation act shall be in excess of the salary paid to the officer or employee holding such position the previous biennium." (Underscoring supplied.)

In view of the fact that salaries for personal services of employees of the Missouri Conservation Commission are not set by statute but are within the power of the Commission under Section 42, Article 4, Missouri's Constitution of 1945, supra, it can readily be seen that for the Legislature to attempt, in an appropriation measure, to prohibit any salary increases would create a situation not unlike that found in State ex rel. Hueller v. Thompson, supra, where the Supreme Court of Missouri ruled the appropriation measure unconstitutional and void, and spoke as follows at 316 Mo. 272, 1.c. 277, 278:

" * * * Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries, is beyond question, but has it the right to do so by means of an appropriation act? We think not.

Honorable William E. Towell

"As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill-conceived, questionable, if not vicious, legislation could be proposed, with the threat, too, that if not assented to and passed, the appropriations would be defeated. The possibilities of such legislation and this court's condemnation thereof are well illustrated in the case of *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, as well as the following cases from other States: *State ex rel. v. Carr*, 13 L.R.A. 177; *Com. v. Greg*, 29 Atl. 297.

"Our Constitution, Section 28, Article IV, is the one certain safeguard against such distracting possibilities and should be strictly followed. We hold, therefore, that Section 100 of the Appropriation Act, under our Constitution, is unconstitutional and void, and it follows that our peremptory writ of mandamus should be granted.

"The question remains, does the invalidity of said Section 100 render the entire Appropriation Act void? We hold that it does not. It is well settled that a legislative act may be void in part, leaving the remainder a good and valid statute where the part that is valid may be separated from the part that is void. [*State ex rel. v. Gordon*, 236 Mo. 142; *State ex rel. v. Taylor*, 224 Mo. 474.]"

In line with the reasoning found in the foregoing quotation from *State ex rel. Hueller v. Thompson*, supra, it follows that the language "except salary increases" found in the appropriation for "personal service" in Sections 4.510 and 4.520 of the appropriation measure being considered herein is a provision unconstitutional and void, but may be separated from the whole without causing the remaining portions of the appropriation measure to violate the true legislative intent to appropriate for personal services, an intent so obvious as to be unquestioned.

Honorable William E. Towell

CONCLUSION

It is the opinion of this office that language found in Sections 4.510 and 4.520 of Senate Committee Substitute for House Committee Substitute for House Bill No. 4, passed by the 69th General Assembly, Second Extra Session, appropriating for Personal Service of employees of the Missouri Conservation Commission, excepting salary increases, is unconstitutional and void and contravenes Section 23, Article 3, Missouri's Constitution of 1945, as an appropriation measure containing legislation. The unconstitutional portion of said measure may be eliminated without causing both sections to fall.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO:M:cm

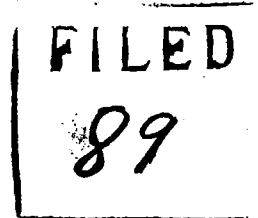
INITIATIVE PETITIONS:
FILING DATE:
CALENDAR MONTH:

Initiative petitions must
be filed with the Secretary
of State on or before
midnight, July 3, 1958,
since that date is the last day which is not less than four months
before the General Election, which this year will be November 4,
1958.

OPINION No. 89

June 24, 1958

Honorable Walter Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri



Dear Sir:

This office is in receipt of your letter dated June 11, 1958,
in which Mrs. Eula H. Huss, acting chief clerk, requests a legal
opinion on the following question:

"What is the final date for filing initiative
petitions with the office of the Secretary of
State?"

We would first direct your attention to Article III, Section
50, Constitution of Missouri, 1945, to wit:

"Initiative petitions proposing amendments to
the Constitution shall be signed by eight per
cent of the legal voters in each of two-thirds
of the congressional districts in the state,
and petitions proposing laws shall be signed
by five per cent of such voters. Every such
petition shall be filed with the secretary
of state not less than four months before the
election and shall contain an enacting clause
and the full text of the measure. Petitions
for constitutional amendments shall not contain
more than one amended and revised article of
this Constitution, or one new article which
shall not contain more than one subject and
matters properly connected therewith, and the
enacting clause thereof shall be 'Be it resolved
by the people of the state of Missouri that the
Constitution be amended:' Petitions for laws
shall contain not more than one subject which
shall be expressed clearly in the title, and
the enacting clause thereof shall be 'Be it

Honorable Walter H. Toberman

enacted by the people of the state of
Missouri.'" "

In view of this section of the Constitution of Missouri the question, therefore, narrows itself to what is the date in this particular year of 1958, which is not less than four months before the election?

In Section 1.020, paragraph 6, RSMo 1949, the term month is defined as follows: "The word month shall mean a calendar month * * * * *." And in Section 1.040, RSMo 1949, computation of time is defined as follows:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

The Missouri definition of month as set out above is in harmony with the general rule in the United States on calendar month, as found in 62 C.J. Sec. 17:

"In the United States, although there has been some conflict of decisions, the current of authority is to the reverse of the English rule, and a large majority of the states have enacted statutes defining the meaning of the term, and it is now the rule, both under the statutes and by common acceptance, that the word 'month,' when used in a statute, judicial proceeding, or contract, means a calendar month, unless there is something to indicate that a contrary meaning was intended, such as that it was expressed or intended to mean thirty days, as where it is used as a regular and constant measure of time, or, in some jurisdictions, in respect of sentences to imprisonment. Calendar month under this rule refers to length of time and not a specific month, and the period may begin on any day."

In view of the above laws and citations, it is the opinion of this office that July 3, 1958, is the last day on which an initiative petition can be filed with the Secretary of State in the year 1958,

Honorable Walter H. Toberman

since that would be the last day which is "not less than four months" before the General Election which will be held on November 4, 1958.

CONCLUSION

It is, therefore, the official opinion of this office that initiative petitions must be filed with the Secretary of State on or before midnight, July 3, 1958, since that date is the last day which is not less than four months before the General Election, which this year will be November 4, 1958.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. J. Burleigh Arnold.

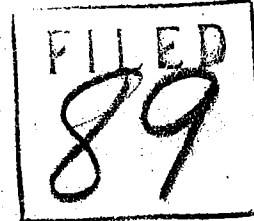
Yours very truly,

John M. Dalton
Attorney General

SCHOOLS: County plan of reorganization may be submitted even though it includes territory of another county which has less than one year previously voted upon a rejected plan of reorganization for such other county.

SCHOOL DISTRICTS:

December 1, 1958



Honorable Francis Toohy, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Sir:

This is in response to your request for opinion dated July 25, 1958, which reads as follows:

"The County School board of Perry County submitted to a vote a plan for reorganization for the County on April 15th, 1958. This reorganization plan failed to receive the sufficient votes to carry in Perry County. Since this election the Madison County board has petitioned the Perry County board to assign the Oak Grove district #59 of Perry County to the Madison County board for the purpose of placing it in their reorganized district #R3 of Madison County. This would be the second reorganization for District #R3 of Madison County and the question then arises whether the Oak Grove District #59 of Perry County would be entitled to vote on the reorganized plan of District #R3 in the event that said district was assigned to Madison County. The statute is clear that an election can not be called for one year after the failure of a reorganized plan within a county. It is not clear whether the Oak Grove district if attached to Madison County would be entitled to vote on a reorganized plan in the Madison County district. So would you please give an opinion as to the following question:

Honorable Francis Toohey, Jr.

"May a district which has voted as part of a reorganized plan in one County be assigned to another County and thence vote on a reorganized plan in that County although a year has not elapsed since the reorganized plan was submitted in the county of which it was a part?"

By subsequent letter dated November 21, 1958, you have advised us that the major portion of the assessed valuation of the reorganized district which proposed to include the Oak Grove District No. 59 of Perry County would be in Madison County.

The statute in question is Section 165.693, RSMo 1949, which reads as follows:

"In the event that any proposed enlarged district has not received the required majority affirmative vote, the school districts constituting the proposed new school district shall remain as they were prior to the election, but in all such cases the county board of education shall prepare another plan in the same manner as provided for the first plan and the second plan shall be submitted to a vote in like manner as the first, but not sooner than one year nor later than two years after the date of disapproval of the first plan. Any subsequent plan shall not be submitted sooner than one year following the date on which the last vote on reorganization was taken."

The time element involved in the above statutory provision has been considered only twice by the appellate courts of this state. Those cases are: Willard Reorganized School Dist. No. 2 of Greene County v. Springfield Reorganized School Dist. No. 12 of Greene County, Mo. App., 248 SW2d 435; State ex rel. Rogersville Reorganized School Dist. No. R-4 of Webster County v. Holmes, 363 Mo. 760, 253 SW2d 402. Neither of these cases has any direct bearing upon the question at issue except it can be said as a fair inference from the latter case, and its reference back to State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 SW2d 785, that the prohibition against the

Honorable Francis Toohy, Jr.

submission of a subsequent plan not less than one year following the date on which the last vote on reorganization was taken is mandatory.

The general scheme of reorganization has been considered in the Webster County case, *supra*, and in the enclosed opinions issued to Honorable Hubert Wheeler dated January 14, 1949, and to Honorable Weldon W. Moore dated September 9, 1953. Consequently, it will be unnecessary to set that scheme out again in detail. Suffice it to say, that the "plan" of reorganization contemplated by Sections 165.657 - 165.707, RSMo, is a county plan.

It is further contemplated that some proposed enlarged districts encompassed by a county plan would include territory in another county. For example, it is provided in Section 165.673, RSMo 1949, that the county board of education shall "Cooperate with boards of adjoining counties in the solution of common organization problems." In Section 165.677, RSMo, Cum. Supp. 1957, it is provided that: "If the plan includes any proposed district with territory in more than one county, the (state) board shall designate the county containing the greater portion of such proposed district based upon assessed valuation as the county to which such district shall belong." (Word in parentheses supplied.)

In discussing the reorganization law, the Supreme Court said in the Webster case, *supra*, at SW2d 1.c. 403:

" * * * Its purpose was to promote the rapid merger of the multitude of small, inadequately equipped and financed school districts of this State into fewer and larger districts with financial resources to provide adequate buildings, teaching staffs and equipment. * * *"

At SW2d 1.c. 404, the Court said further:

"The object and purpose of the law is to effect a general reorganization of the school districts of this State. It should be liberally construed to the end that its ultimate objective may be attained. State ex rel. Acom v. Hamlet, *supra*, 250 S.W. 2d loc. cit. 498. * * *"

Honorable Francis Toohy, Jr.

If a desirable plan of reorganization for Madison County would include Oak Grove District No. 59 of Perry County, the laws concerning reorganization should be liberally construed so as to effect this if possible to do so.

The prohibition in Section 165.693, supra, is not against the holding of an election within a district within a certain period of time as in Section 165.300, RSMo, Cum. Supp. 1957, which was the subject of the Hawk case, supra. Rather, it is against the submission of a "subsequent plan," i.e., a county plan. Construing the statute liberally in order to effectuate the purposes of the law, we believe it does not prohibit the submission of a Madison County plan under the circumstances outlined in your request, even though less than one year has elapsed since the submission of the Perry County plan.

CONCLUSION

It is the opinion of this office that a county plan of reorganization of school districts may be submitted even though it includes territory of another county which has less than one year previously voted upon a rejected plan of reorganization for such other county, provided the major portion of the assessed valuation of the proposed enlarged district is in the county submitting the plan.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (2)

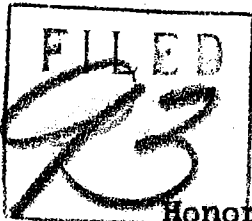
JUVENILE CODE:
PEACE OFFICERS' RECORDS:
HIGHWAY PATROL:

(1) Copies of reports on recovered vehicles may be furnished to the National Automobile Theft Bureau or other agencies concerned with ownership of the vehicle or with prosecution of offenses so long

as the name of the child is omitted from such reports; (2) copies of accident reports may be furnished to insurance companies and attorneys who are interested in civil actions so long as there is an omission from such reports of the charge of an offense; (3) likewise, and under the same conditions, copies of accident reports may be furnished to the Missouri State Highway Department; (4) information concerning juveniles may be furnished to other law enforcement agencies and the proper authorities may be notified when juveniles are taken into custody for violation of laws in other states or federal jurisdictions so long as such information is furnished with an understanding that it is not to be public information.

January 16, 1958

Mimeo Copies



Honorable Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This will acknowledge receipt of your opinion request of August 30, 1957 in which you have raised several questions as to whether or not certain records are prohibited from inspection and disclosure in view of the new juvenile code, Senate Bill No. 15, 69th General Assembly. The essential part of the opinion request reads as follows:

"In view of the provisions in Section 211.310, subparagraph 2 of Senate Bill Number 15, it is hereby requested that this department be furnished with an answer to the following questions:

"(1) May copies of the report on recovered vehicles be furnished to the National Automobile Theft Bureau, Federal Bureau of Investigation or other agencies concerned with ownership of the vehicle or with prosecution of offenses?

"(2) May copies of accident reports bearing the names of juveniles who have been charged with an offense be furnished to

Honorable Hugh H. Waggoner

insurance companies and attorneys who are primarily interested in civil action?

"(3) May copies of accident reports bearing the names of juveniles who have been charged with offenses be furnished to the Missouri State Highway Department where the primary concern is to make engineering studies?

"(4) May information regarding reports contained in the files of this department covering the activities of juveniles be furnished to other law enforcement agencies? Inquiries are frequently received from police and sheriffs who are conducting investigations of the activities of juveniles who have been taken into custody. Since this department does maintain a statewide record the identification bureau files have become more or less a clearing house for this type of information.

"(5) In those cases where juveniles are taken into custody and it is determined they have violated laws in other states or federal jurisdictions, may the proper authorities in those jurisdictions be notified by this department, or is such notification the responsibility of the juvenile judge?"

Hereinafter, references to sections in Senate Bill No. 15, 69th General Assembly, will be made to the section numbers only.

The questions have arisen because of the prohibition against inspection and disclosure of peace officers' records of children contained in subsection 2 of Section 211.310. The said subsection reads as follows:

"Peace officers' records, if any are kept, of children, shall be kept separate from the records of persons over seventeen years of age and shall not be open to inspection or their contents disclosed, except by order of the court. This subsection does not apply to children who are transferred to courts of general jurisdiction as provided by section 211.070 of this act."

Honorable Hugh H. Waggoner

Research of the subject of privileged records and related subjects has been of little, if any, help in resolving the questions raised in the opinion request. In other words, the specific questions under consideration do not appear to have been heretofore discussed or resolved by the courts. The particular subsection quoted above is not ambiguous in creating a prohibition against inspection and disclosure of certain records but the intention of the General Assembly is not clear as to when the records of peace officers come within the scope of the prohibition contained in such subsection.

The policy of the juvenile code, in general, is to proceed with a view toward the child's reformation while the policy is manifested throughout the code with respect to the privilege against inspection and disclosure of peace officers' records of children is to prevent such facts from being publicized so that any stigma which might result from having been involved in proceedings under the act will not attach to the child. We do not believe, on the other hand, that the intention was to make privileged matters found in police officers' records and pertaining to persons under seventeen years of age when such matters do not pertain to proceedings or possible proceedings under the act. Neither, from the policy manifested in the code, does it appear that the apprehension of criminal offenders was to be interfered with. This might be a practical result if peace officers' records of persons under seventeen years of age, under any circumstances, were to be privileged from inspection and disclosure. There would be many other practical inconsistencies with the intention of the legislature if Section 211.310 (2) were given a strict literal interpretation.

With this background, we turn now to the specific questions in the opinion request.

The first question is:

"(1) May copies of the report on recovered vehicles be furnished to the National Automobile Theft Bureau, Federal Bureau of Investigation or other agencies concerned with ownership of the vehicle or with prosecution of offenses?"

We believe that such copies may be furnished the National Automobile Theft Bureau and other unofficial agencies actually concerned so long as the name of the child is omitted from the

Honorable Hugh H. Waggoner

report. Insofar as the Federal Bureau of Investigation is concerned, we think that our subsequent answer to your fourth question is applicable.

The second and third questions read as follows:

"(2) May copies of accident reports bearing the names of juveniles who have been charged with an offense be furnished to insurance companies and attorneys who are primarily interested in civil action?

"(3) May copies of accident reports bearing the names of juveniles who have been charged with offenses be furnished to the Missouri State Highway Department where the primary concern is to make engineering studies?"

Again, we do not believe that the matters contained in such reports are within those intended to be privileged. We believe that such reports may be made available so long as the fact that the child is charged with an offense is omitted from such reports.

The fourth question is an inquiry as to whether or not information regarding reports contained in the files of the Highway Patrol Department, covering the activities of juveniles, may be furnished to other law enforcement agencies. As previously indicated, we do not believe that it was the intention to restrict or interfere with the officers charged with the duty of law enforcement. Therefore, such information may be furnished so long as it is furnished with the understanding that it is to be used toward the performance of the official duties of the law enforcement agencies and is not to be made public information.

The last inquiry pertains to juveniles who have violated laws in other states and are taken into custody in this state and the question arises as to whether or not such information may be given to the proper authorities in the other jurisdictions. For the reasons and under the same conditions stated with regard to the fourth question, we hold that the same may be done.

CONCLUSION

It is, therefore, the opinion of this office that: (1)

Honorable Hugh H. Waggoner

copies of reports on recovered vehicles may be furnished to the National Automobile Theft Bureau or other agencies concerned with ownership of the vehicle or with prosecution of offenses so long as the name of the child is omitted from such reports; (2) copies of accident reports may be furnished to insurance companies and attorneys who are interested in civil actions so long as there is an omission from such reports of the charge of an offense; (3) likewise, and under the same condition as stated in conclusion No. 2 copies of accident reports may be furnished to the Missouri State Highway Department; (4) information concerning juveniles may be furnished to other law enforcement agencies, and the proper authorities may be notified when juveniles are taken into custody for violation of laws in other states or federal jurisdictions so long as such information is furnished with an understanding that it is not to be public information.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Henry.

Very truly yours,

John M. Dalton
Attorney General

HLH:hw,vlw

STATE HIGHWAY PATROL:

Members may serve police demand order for surrender of license and registration at locations other than on a public highway and the acceptance of voluntary surrender of license to a member of the patrol does not constitute a seizure within Senate Bill No. 7 of the 69th General Assembly.



July 3, 1958

Col. Hugh H. Waggoner
Superintendent, Missouri State
Highway Patrol
State Office Building
Jefferson City, Missouri

Dear Col. Waggoner:

We have received your request for an opinion of this office, which request is as follows:

"Senate Bill No. 7 which was passed by the Second Extra Session of the 69th General Assembly provides that members of the patrol shall have the power of search and seizure on a public highway of this state. This bill also provides that the superintendent of the patrol shall post a bond in the sum of fifty thousand dollars conditioned upon the payment to persons injured of all damages arising out of any unlawful search, seizure or arrest made by any member of the patrol.

"Section 303.330 of 'The Motor Vehicle Safety Responsibility Law' provides that if any person shall fail to return to the Director the license or registration which has been suspended, the Director shall forthwith direct the Missouri State Highway Patrol or any peace officer to secure possession thereof and to return the same to the Director.

"The Director, acting under the authority of Section 303.330, sends to us numerous

Col. Hugh H. Waggoner

'Police Demand Orders' directing us to secure the license plates and/or operator's and chauffeur's licenses of persons suspended by him. In order for our officers to serve these Police Demand Orders and secure the licenses it is necessary that the licensee be contacted at his home or place of employment. Since these Police Demand Orders are not served, and the licenses secured, on a public highway, we would appreciate receiving an official opinion on the following questions:

1. Can a member of the patrol legally serve a Police Demand Order and secure the licenses at any location not on a public highway?
2. If the licensee voluntarily surrenders his licenses to a member of the patrol upon presentation of a Police Demand Order, does this constitute a seizure under Senate Bill No. 7?"

In answering your first question, we are assuming that possession is secured in the manner described in your second question, i.e., voluntary surrender of the license by the licensee upon presentation of the police demand order. Upon such assumption, it appears that both questions may be considered together. Furthermore, in such circumstances the question becomes one of statutory construction, and constitutional questions relating to unreasonable searches and seizures are not involved inasmuch as a voluntary surrender is not a seizure within the meaning of the constitutional provisions relating thereto. 79 C.J.S., Searches and Seizures, Section 1, page 76.

As a matter of statutory construction, the problem becomes primarily one of ascertaining the legislative intent in the enactment of Senate Bill No. 7 of the 69th General Assembly, Second Extra Session, as that bill relates to Section 303.330, RSMo, 1957 Cum. Supp.

Senate Bill No. 7 of the 69th General Assembly, Second Extra Session, repealed and re-enacted Section 43.200, RSMo 1949. The first subparagraph of that enactment, with which we are here concerned, provides as follows:

Col. Hugh H. Waggoner

"1. The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person, and except that the members of the patrol shall have the power of search and seizure on a public highway of this state."

Section 303.330, RSMo, 1957 Cum. Supp., provides as follows:

"Any person whose license or registration shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this chapter, shall have been canceled or terminated, or who shall neglect to furnish other proof upon request of the director shall immediately return his license and registration to the director. If any person shall fail to return to the director the license or registration as provided herein, the director shall forthwith direct the Missouri state highway patrol or any peace officer to secure possession thereof and return the same to the director."

"(O)ne of the accepted canons of statutory construction permits and often requires an examination of the historical development of the legislation, including changes therein and related statutes." State ex rel. Klein v. Hughes, 351 Mo. 651, 173 SW2d 877, 879(3). The history of the two statutory provisions here involved is, we feel, quite enlightening in considering your inquiry. Section 43.200, RSMo 1949, was originally enacted in 1931 as part of the original bill establishing the State Highway Patrol. As Section 16 of an act found in Laws of Missouri, 1931, page 230, it provided:

"The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person."

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Until the enactment of Senate Bill No. 7 of the 69th General Assembly, Second Extra Session, the provision remained unchanged from its original enactment appearing, as mentioned above, in the 1949 Revised Statutes as Section 43.200.

That section had been considered by the courts and had been held absolutely to prohibit searches and seizures by members of the State Highway Patrol even in circumstances where no constitutionally prohibited searches and seizures were involved. *State v. Smith*, 357 Mo. 467, 209 SW2d 138, decided in 1948.

What is now Section 303.330, RSMo, 1957 Cum. Supp., was originally enacted in 1953, Laws of Missouri, 1953, page 569, 585. At that time, the General Assembly, in imposing upon the members of the Highway Patrol the duty of "securing possession" of licenses and registration, was presumably aware of the construction placed upon Section 49.200 by the courts. Inasmuch as insofar as any "securing possession" authorized by Section 303.330 did not involve an unreasonable seizure in a constitutional sense (*Star Square Auto Supply Co. v. Gerk*, 325 Mo. 968, 30 SW2d 447), the General Assembly was quite free to relax insofar as it saw fit the limitations which it had imposed upon the Highway Patrol by Section 43.200. We are thus led to conclude that, in enacting Section 303.330, the Legislature either did not consider the action there authorized a seizure within the meaning of Section 43.200 or intended to make any seizure authorized by Section 303.330 a special exception to the general limitation upon the patrol's power of search and seizure. As a special statute, Section 303.330 would have been effective insofar as any conflict between it and the pre-existing general Section 43.200 was concerned. *State ex rel. City of Springfield v. Smith*, 344 Mo. 150, 125 SW2d 883.

Such was the situation at the time of the enactment of Senate Bill No. 7, here involved. The duty had been imposed upon the patrol to "secure possession" of licenses and registration in circumstances authorized under Section 303.330, regardless of the almost absolute prohibition against searches and seizures by the patrol which the General Assembly had likewise applied. In enacting Senate Bill No. 7, the purpose of the General Assembly was in nowise to limit further the search and seizure power of the patrol, but the purpose was rather to extend such powers. Such purpose is obvious from the language of the bill itself and may also be found in the Special Message of the Governor proposing to the General Assembly the amendment of Section 43.200. Senate Journal, 69th General Assembly, Second Extra Session, Fourth Day - Wednesday, February 12, page 47.

Col Hugh H. Waggoner

It is thus obvious that Senate Bill No. 7 extended the power of the patrol and there is no indication to be found that the General Assembly intended to curtail or remove from the patrol any of the other duties which had been imposed upon it, including the duty under Section 303.330. To assert that the General Assembly, in extending the power of the patrol, generally, intended at the same time to limit and restrict the authority previously granted the patrol by the General Assembly in a particular field would produce an absurd result which the General Assembly would not have intended, and the legislation should therefore not be so construed. *Mammel v. Thomas*, 238 Mo. App. 403, 181 SW2d 168. Such construction likewise accords with the general rule of legislative construction that a subsequent general act does not operate to repeal by implication a special statute unless there is a manifest repugnancy between the general and special statutes, which we fail to find here. *Hurlburt v. Bush*, 284 Mo. 397, 224 SW 323.

Therefore, we conclude that the General Assembly, in enacting Senate Bill No. 7 of the 69th General Assembly, Second Extra Session, did not intend to limit the authority previously conferred upon members of the Highway Patrol to "secure possession" of licenses and registration under Section 303.330, RSMo, 1957 Cum. Supp.

This conclusion is limited to the circumstances referred to in your opinion request, wherein the licensee voluntarily surrenders his license upon presentation of the so-called police demand order. A further and perhaps more difficult question would arise in determination of the authority of a member of the Highway Patrol to seize the license upon the refusal of the licensee involved to surrender his license upon presentation of the police demand order. That matter, however, will not be gone into at this time.

CONCLUSION

Therefore, it is the opinion of this office that a member of the Missouri State Highway Patrol may legally serve a so-called police demand order requiring a person whose license or registration shall have been suspended for noncompliance with the Motor Vehicle Responsibility law to surrender such license and may accept the voluntary surrender thereof from the licensee at any location, whether or not it be on a public highway.

It is the further opinion of this office that the voluntary surrender of the license by the licensee to a member of the

Col. Hugh H. Waggoner

patrol upon the presentation of a police demand order does not constitute a seizure within Senate Bill No. 7 of the 69th General Assembly, Second Extra Session.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

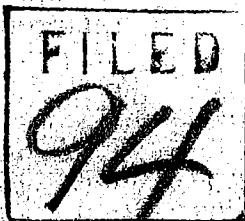
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

ELECTIONS:
SCHOOL DISTRICTS:
TAX LEVY INCREASE:

Before there can be a valid election to increase the school district tax levy there must be sufficient notice of such election and purposes. For purpose of increasing school term from 8 to 9 months, there need not be notice of such election.



May 15, 1958.

Honorable Richard M. Webster
Assistant Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Mr. Webster:

This is in answer to your letter of April 17, 1958, in which you request an opinion from this office as follows:

"You will find attached hereunto a notice of an annual school meeting of the Erie School District of Jasper County, Missouri, and the minutes of the meeting.

"You will note that in the notice of the meeting there were two specific items of business referred to:
1. To vote a sufficient levy. 2. To elect one board member for a three year term.

"You will further note that on the notice of annual meeting it was specifically stated that the amount required to meet the budget was \$1.90.

"The school district has for many years been on an eight month basis.

"The meeting was attended by four people. The Clerk of the district was not able to be present, and the minutes were kept by an Acting Clerk. By a vote of 3 to 1 a levy of \$2.20 was approved and by a similar vote the term of the school year was increased from 8 to 9 months.

"A question has been raised as to whether or not the election was valid for reason that the notice specifically stated that the levy required was \$1.90, but that a levy of \$2.20 was submitted, and for the further reason that no notice was given as to a change of the school term from 8 to 9 months.

"Please advise as to whether the election was a valid one, and second as to whether the tax may be assessed if there is no contest of the election."

Honorable Richard M. Webster

We first choose to discuss the matter of the voting of the levy of \$2.20. We are enclosing an opinion dated April 1, 1948, which expresses the law with respect to the necessity of notice required by Sections 165.080 and 165.200, RSMo., when there is to be an election pertaining to the increase of the school district levy. It is to be observed that Section 165.080, RSMo., Cumulative Supplement 1957, creates a situation in which notice is to be given in accordance with Section 165.200 when there is to be an increase in the tax levy. We feel that this previous opinion sufficiently establishes the law and the policy which is to be followed in this instance.

With respect to the notice of the meeting your letter and enclosure make it clear that notice was given, to the effect that there would be an election for the purpose of increasing the school levy. However, it is our belief that such notice was not sufficient to be deemed compliance with Sections 165.080 and 165.200, and because of such insufficiency of this notice that part of the election is void.

In concluding that this notice is insufficient we look to the basis for any notice of elections with regard to tax increases, and it would seem obvious that such notice is to provide the voters with knowledge of the subject of the election so they may educate themselves as to its desirability. In the case of *Peter v. Kaufmann*, 38 S.W.2d 1065, the court states:

"It is these notices which the voters see and consult in order to determine what propositions are to be voted on and decided at the annual meeting, and, if the notices impart intelligent information as to this, that is all that is required."

It is our belief that notice of an election to increase the tax levy in accordance with Section 165.080, in order to impart intelligent information, must state the exact amount that is to be voted upon, and the purposes for which the specific sums are to be levied.

We call your attention to the case of *State ex rel. School District of Affton v. Smith*, 80 S.W.2d 858, in which the proposition voted on was consolidation of school districts. As is pointed out in a previous opinion, the court held that where the statutes require notice any action taken by the voters without notice, or with an insufficient notice, is void. Therefore, we feel that although there was notice to vote an increase in the tax levy of the Erie School District there was not a sufficient notice to authorize the increase to \$2.20. The notice that has been submitted to this office shows the levy required to raise local taxes to be \$1.90. Inasmuch, then, as there was insufficient notice the *Smith* case is applicable and this portion of the

Honorable Richard M. Webster

election is void.

You raised by your letter the question whether this election would be void or voidable, and it is our belief, as expressed in the enclosed opinion of May 22, 1956, that the election is void rather than voidable. In this 1956 opinion substantially the same question was involved as you present. This opinion, citing cases, determined that:

"No notice having been given as required for the increase in the teachers' fund which, in fact, was voted, said levy is invalid. This must be resubmitted."

However, it must be observed from this opinion that only the part of the election which was not in compliance with mandatory provisions of the law will be void. You will see that in the absence of a special provision such as Section 165.080, Section 165.203 lists the powers with which qualified voters are possessed when assembled at the annual meeting. You will also see that paragraph 4 of Section 165.203, RSMo 1949, is authority for determining by ballot the length of school term in excess of eight months for the ensuing school year. We also call your attention to the fact that when read alone the first sentence of Section 165.200, RSMo 1949, is the only sentence in that section pertaining to annual meetings. Therefore, unless another section is applicable there need be no notice of the purposes of, or the subjects to be taken up during, the annual meeting, other than that provided by these two sections of the statute. Therefore, we feel that that portion of the election which increased the Erie School District's school year from eight to nine months was not invalid and is not subject to challenge even though no notice was provided with respect to that school year increase.

CONCLUSION

It is the opinion of this office that that part of the election conducted by the Erie School District of Jasper County, Missouri, on the 1st day of April, 1958, for the purpose of increasing the school tax levy is invalid and void because of insufficiency of notice.

With respect to that part of the election upon which an increase of the school term from eight to nine months was voted, there was notice in compliance with the law, and this will be upheld.

Very truly yours,

John M. Dalton
Attorney General

JBS:lc:ld

TAXATION:
TAX SALE:
COUNTY COURT:

In the event that a sale and conveyance of land for taxes is invalid because the taxes on said land had, in fact, been paid, the county is not liable for payments to the purchaser of such invalid sale except as provided in Section 140.530, RSMo 1949.

The county in which the land is located does not warrant and defend title in a suit brought by the owner of the property sold at tax sale.



April 25, 1958

Handwritten initials 95

Honorable Edward G. Westhouse
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Westhouse:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"I would appreciate it very much if your office would render an opinion for the County Court on the following matter.

"In 1953, the Collector sold a parcel of land at a tax sale. In 1955, the Collector gave the purchaser a Collector's Deed on this land. Now the taxes on this land had always been paid, even up to the present time. Therefore the land should never have been advertised and sold under the Jones Munger Law. However, after the tax sale the taxes were also paid by the purchaser at the tax sale. Under Section 140.530, RS Mo, 1949, the County Court must reimburse the purchaser at the tax sale that sum of money which he paid at the tax sale and all subsequent taxes that the purchaser at the tax sale had paid, including six percent interest.

"However, the purchaser at the tax sale through his attorney maintains that the County also owes him the amount of money which he expended in surveying the land purchased at the tax sale. He also maintains that the County warrants title and

Honorable Edward C. Westhouse

should defend any suit brought by the true owner. Is it your opinion that the County could not be liable for any sum except what was received from the purchaser at the tax sale and the sum received as taxes from and after the tax sale, including six percent interest and that the County must warrant and defend title?"

Section 140.530, RSMo 1949, to which you refer, provides that if the taxes have been paid before sale, the sale or conveyance shall be a nullity, and the purchase money, with interest, shall be paid to the purchaser out of the county treasury. Said section more fully provides as follows:

"No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

We have examined diligently the provisions of Chapter 140, V.A.M.S., and are unable to find any provision, other than Section 140.530, requiring the county to make a refund to the purchaser for an invalid tax sale. More specifically, we do not find any provision which would entitle the purchaser to reimbursement for the costs of a survey, out of the county treasury.

Secondly, it is the opinion of this office, that under the facts that you have outlined, the county does not warrant and defend title in a suit brought by the true owner. We do not find any statutory provision which imposes such a duty or obligation upon the county. The terms of a deed of conveyance, under a tax sale (see Section 140.460) would appear to strongly militate against any implied warranties by any party (Section 442.420) and certainly said deed does not contain any expressed warranties on behalf of the county. However, we do not believe that it is necessary to determine whether the deed does, in fact, contain implied warranties. Assuming (for the purpose of argument only), that the deed does contain warranties, they would not bind the

Honorable Edward C. Westhouse

county. The county is not a party to the deed but, instead, the deed runs from the State and is executed by its agent, the county collector.

CONCLUSION

Therefore, it is the opinion of this office that in the event that a sale and conveyance of land for taxes is invalid because the taxes on said land had, in fact, been paid, the county is not liable for payments to the purchaser of such invalid sale, except as provided in Section 140.530, RSMo 1949.

It is the further opinion of this office that the county in which the land is located does not warrant and defend title in a suit brought by the owner of the property sold at tax sale.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton
Attorney General

DDG:bw

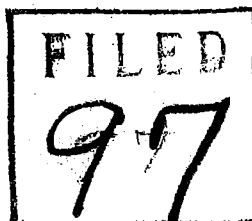
STATUTES:

JURORS AND WITNESS' FEES: Supp. 1957.

MILEAGE:

Construction of Section 137.131(3) Mo.RS Cum.

assessors;



February 3, 1958

Honorable Robert E. Wilson
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion relative to compensation and mileage of jurors and witnesses.

You specifically inquire if a juror sitting in a particular case, when said jury of which he is a member, is permitted to separate at the evening recess, with instructions to report for jury service on the following morning, to resume the trial of the same case, is entitled to mileage each day for traveling to and from the courthouse. You also make the same inquiry with respect to witnesses.

This Department, under date of March 23, 1938, rendered an opinion to the then prosecuting attorney of Greene County, Missouri, a copy of which we are enclosing, holding that a juror could only collect mileage for one trip from his home to the courthouse and return home from the time he was summoned until finally discharged.

The statute under construction at that time used similar language as the present statute insofar as it relates to the payment of such mileage. It provided a certain specified amount for every mile he may necessarily travel, going from his place of residence to the courthouse and returning to same.

In view of the holding in the foregoing opinion we believe the same ruling applicable in the instant case.

In reply to your second request, we are enclosing a copy of an opinion rendered by this Department under date of January 6, 1958, to the prosecuting attorney of Mississippi County, Missouri, which we believe in point, and fully answers your second inquiry

Your last request for an opinion reads:

"My final question deals with the meaning

Honorable Robert E. Wilson

of section 137.131(3) Laws of 1957. This section provides that the circuit clerk and ex officio recorder of deeds in third class counties shall furnish the county assessor, on or before the 15th day of each month, a list of real estate transfers showing the names of the grantor and grantee, the consideration paid and a brief description of the real estate transferred. I have been requested to obtain a ruling from you as to whether the words 'a brief description' call for an exact description of the real estate showing all distances, beginning points, courses and other matters exactly as set out in the deed, or whether it would be sufficient in the case of farm land merely to describe it as being part of a certain quarter of a certain section, township and range, and in the case of town lots to describe the same as being part of a certain lot in a certain block in a certain addition."

Section 137.131, MoRS Cum. Supp. 1957, reads:

"The circuit clerk and ex officio recorder of deeds of each county of the third class shall furnish the county assessor of his county, or the township assessor in counties with township organization, on or before the fifteenth day of each month, a true and complete list of all real estate transfers completed in the county or township during the preceding month. The list so furnished shall contain the following information relating to each transfer:

- "(1) The names of the grantor and grantee;
- "(2) The consideration paid;
- "(3) A brief description of the real estate transferred; and
- "(4) The book and page number where each deed is recorded." (Emphasis theirs.)

It is apparent that by reference to a brief description in the foregoing statute of the real estate transferred, that it does not mean a complete description as one would use in describing real estate in a general warranty deed. Had it been the legislative in-

Honorable Robert E. Wilson

tent to have the list contain a complete description it would have been unnecessary to make such references as to its containing a brief description, or the further requirement that it contain the page and book number where said transaction was recorded in the recorder of deeds' office.

In view of the facts, said list shall also include the page and book number of the recording, there can be no reason for any doubt or want of an accurate description, because one can always examine the public record wherein said transaction is recorded, and thereby find the description of said land by metes and bounds.

In *Tokheim Oil Tank & Pump Co. v. Fentress*, 33 F. (2d) 730, the court construed a statute of the state of Virginia relative to every sale, or contract for sale of goods and chattels, which statute contained one provision that said sale or contract shall contain among other things "a brief description of the goods and chattels and the terms of the reservation or condition." The court in holding a brief description sufficient, although it is not sufficient to enable one to identify the property without inquiry, held that it, at least, indicates the line of inquiry and furnishes the basis for investigation, said, at l.c. 732:

"The 'brief description' of goods sold, required by Code Supp. Va. 1922, §5189, to be contained in conditional sales contract and filed as therein prescribed, is adequate, though it is not sufficient to enable one to identify the property without inquiry if it at least indicates the line of inquiry and furnishes basis for investigation."

Also, in *Tilton v. H. M. Wade Manufacturing Co.*, 2 F. 2d 358, l.c. 359, the court, in construing the same statute referred to in the preceding decision, after referring to the phrase in the statute "brief description of the goods and chattels", held that it showed that in the matter of description there should necessarily be some latitude allowed.

We believe the foregoing decisions are analogous, and that in view of said decisions and the statute in question providing that said description must also show the page and book number wherein said transaction is duly recorded, we conclude that such description as referred to in your inquiry is sufficient.

Honorable Robert E. Wilson

CONCLUSION

We believe the holding in the enclosed opinion, rendered on March 23, 1938, is applicable to your request as to the mileage a juror and witness is entitled to receive under the circumstances stated in your request.

We are further of the opinion that the enclosed opinion, rendered under date of January 6, 1958, is applicable to your request as to the fee and mileage a juror is entitled to receive under stated circumstances.

Furthermore, that the list of real estate transfers, which the circuit clerk and ex officio recorder of deeds in third class counties is required to file with the county assessor, need not contain a complete detailed description of said real estate in view of the fact that said statute also requires the list, which is to be filed, to contain the page and book number wherein said real estate has been recorded.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

ELECTIONS:
COSTS OF CANVASS OF
PRIMARY ELECTION IN
KANSAS CITY, MISSOURI :

The cost of a primary election canvass in Kansas City is a general expense which is to be paid both by Kansas City and Jackson County equally, as per statute. Section 117.140, RSMo Cum. Supp. 1957.

FILED

October 27, 1958

Honorable James L. Williams
County Counselor
Suite 202, Courthouse
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of a request for an opinion of this office by Assistant County Counselor, Louis Wagner, on the following question:

Is Kansas City liable for its proportionate share of the costs of an election canvass for the county primary election, where the canvass is being conducted by mail by the Kansas City Board of Election Commissioners rather than by judges of election, even though no city proposal or candidate is offered at such election?

We have examined the statutes pertinent to this question and it should be understood at the outset that we are dealing with one county, namely, Jackson County, and one election board, namely, the Kansas City Election Board. We would also point out that this question involves expenses of a primary election canvass at which officers throughout a whole county are nominated and not a general election canvass. We are not concerned about the expenses of a general city election canvass because the problem is not presented here.

We are of the belief that the answer to your question depends upon the application and construction of certain language contained in these two sections of Chapter 117, RSMo Cum. Supp. 1957. Section 117.140 of said Chapter reads:

"In all cities to which this chapter applies, the salaries of the election commissioners and board employees shall be paid one half by the city and one half by the county. The election commissioners shall each receive a salary of three thousand dollars per year, payable monthly. The members of the board

Honorable James L. Williams

designated as the chairman and the secretary, respectively, shall be paid an additional salary of six hundred dollars per year, payable monthly. The chief clerk employed by the board shall receive a salary to be determined by the board, but not less than four thousand dollars per year nor more than four thousand five hundred dollars per year, payable monthly; an assistant to the chief clerk, of the opposite political party of the chief clerk, shall receive a salary to be determined by the board, but not less than three thousand eight hundred dollars per year nor more than four thousand three hundred dollars per year, payable monthly; clerks, not exceeding six in number, shall each receive such salaries as the board may determine, but not less than three thousand four hundred dollars per year nor more than three thousand nine hundred dollars per year, payable monthly; additional clerks, not exceeding ten in number, shall each receive such salaries as the board may determine, but not less than three thousand dollars per year nor more than three thousand four hundred twenty dollars per year, payable monthly; and all additional clerks, if any, shall receive such salaries as the board may determine, but not less than eight dollars per day nor more than ten dollars per day while on duty. Compensation for overtime services necessarily and actually performed by any person employed at the office of the board may be paid at the rate of such employee's regular pay. Precinct judges shall receive as pay, eight dollars for each day or part of day while on duty, except pay shall be allowed only for those days mentioned in this chapter. All expenses incurred by said board of election commissioners and all costs and expenses of registration and election in such cities shall be paid one half out of the city treasury and one half out of the county treasury. (Emphasis ours.)

Section 117.170 RSMo Cum. Supp. 1957, reads:

"At all general, county, state or other elections which include officers elected throughout a whole county, although other than state or county

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officers are also elected, and at all special elections for a county or state officer or member of congress or member of the legislature, each such county shall pay the judges and clerks of election for their services under this chapter in connection with the election held within each such respective county, except that when such city submits any bond proposals, constitutional or charter amendments, or other propositions at any election provided by this section, the salaries of such judges and clerks of elections shall be paid one half out of the city treasury and one half out of the county treasury."

We would also call your attention to Chapter 117, supra, which provides for a Kansas City Board of Election Commissioners and prescribes their duties in some detail.

The Supreme Court of Missouri in a 1956 opinion was faced with the construction of the last two above-cited statutes in the case of Layson v. Jackson County, 290 S.W. 2d 109. The case arose out of a controversy between the Jackson County Board of Election Commissioners and the Kansas City, Missouri, Board of Election Commissioners as to whether Jackson County was obligated to pay the entire compensation of judges and clerks who served in the City of Kansas City at the November 4, 1952, general election or whether the county and city each was obligated to pay one-half. The court, in its decision, took notice of the fact that the statutes, Sections 117.140 and 117.170, supra, had been amended in 1955, which was after the controversy arose (1952), but stated in their opinion that the amendments only strengthened their 1956 decision.

The attorneys for Jackson County, in the Layson case, supra, argued that compensation of judges and clerks is an expense of the election and thus within the language of Section 117.140, supra, while Kansas City counselors contended that the election was a general election and, consequently, the pay of the judges was controlled by Section 117.170, supra. The court ruled as follows:

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"We bear in mind that these statutes relating to the payment of judges and clerks of election must be read in pari materia and, if possible, effect given to each clause and provision, *Davenport v. Teeters*, Mo. App., 273 S.W. 2d 506, 510[1,2] * * *

* * * * *

"We have no difficulty in harmonizing the provisions of the above-quoted sections and in arriving at the conclusion that the provisions of Section 117.170 were applicable to the instant facts. We agree with the county that the language of Section 117.140 (i.e., the words 'expenses of * * * election'), standing alone, included the compensation of judges of elections and that there existed a seeming conflict between that section and Section 117.170 which specifically provided for the county to pay the expenses of the judges of election at all general elections. But when other relevant matters, including other sections of the same chapter of the statutes, are considered, we think that seeming conflict disappears.

"Section 117.050, provided for the creation of a board of election commissioners in Kansas City and, among other things, prescribed their powers and duties. Subsection 6 of Section 117.050 gave the board of election commissioners the power to make rules and regulations for 'the registration of voters and the conduct of elections'. (Our italics.) Section 117.250 provided that the board of election commissioners 'shall provide all necessary ballot boxes and all registry records, poll books, tally sheets, ballots, blanks and stationery of every description, * * * and other equipment necessary and proper for the registry of voters and the conduct of such elections * * *'. (Our italics.) Those expressions, 'registration of voters' and 'conduct of elections', used in other sections of the same chapter considered in connection with the specific provision in Section 117.170 as to the payment of judges and clerks by the county, makes it likely that the language ('All expenses

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incurred by said board of election commissioners and all costs and expenses of registration and election in such cities') was intended to cover and provide for the payment of the expenses of election incident to the election board providing the equipment and paraphernalia in connection with registration of voters and the conduct of elections in Kansas City. In other words, it would appear that Section 117.140 provided for the payment of general expenses incident to the conduct of an election other than those expenses which were otherwise provided for in another section.

* * * * *

"We are of the opinion that the provisions of Section 117.170, as they existed in November 1952, were applicable to instant facts, and that therefore Jackson County was liable to pay the entire compensation for judges and clerks serving in Kansas City at the November 4, 1952, general election. It follows that the trial court correctly ruled that the warrants in question were valid and that plaintiff should recover their face amounts from defendant."

We believe the Layson case, supra, stands for the proposition that Section 117.140, supra, provides for the general expenses of an election in Kansas City, Missouri, to be paid one-half by the city and one-half by the county and that Section 117.170, supra, provides for the expenses of judges and clerks to be paid by the county exclusively in "all general, county, state or other elections which include officers elected throughout a whole county, although other than state or county officers are also elected, * * * except that when such city submits any bond proposals, constitutional or charter amendments, or other propositions at any election such judges and clerks of elections shall be paid one half out of the city treasury and one half out of the county treasury."

In view of the Layson decision, supra, the question then becomes just what type of expenses are the costs of a primary election canvass? It is our opinion that the costs of a primary election canvass are expenses involved in the "registration" and "conduct of an election" and are thus a general expense.

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We believe the above conclusion to be logically and reasonably sound. In Chapter 117, supra, Section 117.420, RSMo Cum. Supp. 1957, sets out the duties of the Kansas City, Missouri, Board of Election Commissioners regarding canvassing of the precincts, and reads:

"Immediately after the close of registration before each election preceding which a house to house canvass is required, the board shall have verification lists prepared for each precinct. Such list shall have the names and addresses of all voters registered in the precinct arranged in the same order as the precinct registers. A canvass shall be made before each general, state and county election, each state and county primary, each general city election."

The purpose of this canvass, we submit, is to verify the dwelling place of the voter with the address as listed on the official registration books of the Board of Election Commissioners. The canvass is thus a part of the registration and conduct of an election.

The court in the Layson case, supra, said that Section 117.140, supra, provided for general expenses to be paid one-half by the city and county unless the expense was otherwise provided for, and we quote (l.c. 111):

" * * * In other words it would appear that Section 117.140 provided for the payment of general expenses incident to the conduct of an election other than those expenses which were otherwise provided for in another section." (Our emphasis.)

We have examined Chapter 117, supra, in its entirety and we conclude that there is no statute or other provision which specifically provides for primary election canvass costs. Therefore, it is our official opinion that "canvassing of the precincts in the 1958 primary election" in Kansas City, Missouri, is part of the registry of voters and conduct of elections and thus embraced within Section 117.140, supra, and the cost of such canvass is a general expense and should be paid by the City of Kansas City and Jackson County equally.

Our position in this opinion is not changed or modified because the canvass was conducted by mail or that no city

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proposal or candidate was offered at such election. We direct your attention to Section 117.430, paragraphs 4 and 6, RSMo Cum. Supp. 1957, which specifically authorizes the Kansas City Board of Election Commissioners to conduct a canvass by United States mail. Paragraph 4, supra, provides, in part:

" * * * A canvass of all precincts or part thereof may be made by mail * * *."

Paragraph 6, supra, provides, in part:

"Before each election preceding which a canvass is required, the board shall have the authority to order said canvass made by any of the methods in this section, in its discretion, * * *."

We would further call your attention to Section 117.140, supra, and state that there is no requirement that a city proposal or candidate be on the ballot in order for the City of Kansas City to be obligated to pay their proportionate share of an election canvass because the last sentence of the above-mentioned statute reads as follows:

" * * * All expenses incurred by said board of election commissioners and all costs and expenses of registration and election in such cities shall be paid one-half out of the city treasury and one-half out of the county treasury."

CONCLUSION

It is, therefore, the conclusion of this office that the answer to your question is in the affirmative and that the costs of a primary election canvass in Kansas City are general expenses which are to be paid both by the City of Kansas City and Jackson County equally, as per statute, Section 117.140, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Burleigh Arnold.

Yours very truly,

John M. Dalton
Attorney General

JBA:mw;ml

EXTENSION OF BOUNDARIES OF
SPECIAL CHARTER CITY WITH
POPULATION OF LESS THAN 20,000:

A special charter city of less than 20,000 inhabitants should extend its boundaries under the provisions of Section 81.080, RSMo, Cum. Supp. 1957, and of Section 71.015, RSMo, Cum. Supp. 1957, when unincorporated areas are to be annexed.



June 27, 1958

Honorable G. A. Witte
Senator, 14th District
Route 13, Box 154
Kirkwood, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I request your opinion and interpretation of the existing statutes authorizing a municipality to extend its boundaries which in the interest of clarity and brevity is stated in the following manner:

'Is a city or town (described in the statute Section 81.010 as a special charter city) which was incorporated by act of the legislature prior to the Constitution of 1875 required to conform to and comply with Section 71.015 V.M.S.A. (adopted in 1953) in extending its boundaries, or is such city, town or municipality required to comply with Section 80.030 V.M.S.A. in extending its boundaries.'

"Reference is made to State vs Lichte 226 Mo. 273 in which the term 'city or town' is construed to mean 'city'."

Subsequent to writing the above opinion request, you have orally informed us that the city regarding which you wish to have this opinion has a population of approximately 3,000.

Honorable C. A. Witte

You have informed us that this city is a special charter city within the purview of Chapter 81, RSMo 1949, and more particularly described by Section 81.010 of that chapter, which reads:

"All cities and towns of this state operating under charters granted directly and specially by the general assembly prior to the adoption of the constitution of 1875 are hereby defined and declared to be cities and towns under special charter, and all laws now existing or which may hereafter be enacted relating or making reference to cities or towns under special charter or special charter cities or towns shall be deemed to and shall apply and be valid in relation only to cities and towns of this state defined and declared in this section to be cities and towns under special charter."

Section 81.080, RSMo, Cum. Supp. 1957, provides, in part, as follows:

"1. Any city or town of less than twenty thousand inhabitants and having a special charter, after the taking effect of such charter, may at any time extend its limits by ordinance, specifying with accuracy the new lines to which it is proposed to extend such limits. All courts of this state shall take judicial notice of the limits of such city when thus extended."

It would appear to us that the aforesaid portion of the new Section 81.080 should be followed by a special charter city with a population of less than 20,000 in extending its boundaries.

We believe also that Section 71.015, RSMo, Cum. Supp. 1957, is also applicable to a special charter city with a population of less than 20,000 when it is proposed that unincorporated areas be annexed. Said Section 71.015 reads:

"Whenever the governing body of any city has adopted a resolution to annex any unincorporated area of land, such city

Honorable G. A. Witte

shall, before proceeding as otherwise authorized by law or charter for annexation of unincorporated areas, file an action in the circuit court of the county in which such unincorporated area is situated, under the provisions of Chapter 527 RSMo, praying for a declaratory judgment authorizing such annexation. The petition in such action shall state facts showing:

1. The area to be annexed;
2. That such annexation is reasonable and necessary to the proper development of said city; and
3. The ability of said city to furnish normal municipal services of said city to said unincorporated area within a reasonable time after said annexation is to become effective. Such action shall be a class action against the inhabitants of such unincorporated area under the provisions of section 507.070, RSMo."

In the case of City of St. Joseph vs. Hankinson, 312 S.W. 2d, page 4, the Missouri Supreme Court discussed the applicability of this section. In that case the City of St. Joseph had sought to extend its city limits under the provisions of Section 71.015, supra. Opponents of the extension raised the argument that this section was unconstitutional. The Missouri Supreme Court held that it was constitutional and that it was applicable in the case of the City of St. Joseph. At 1.c. 7 of its opinion the court stated:

"It is conceded that St. Joseph is a city of the first class under general law (see Chapter 73, RSMo 1949, V.A.M.S., and State ex rel. Moseley v. Lee, 319 Mo. 976, 5 S.W. 2d 83). It is not a constitutional charter city. Thus, the case of McConnell v. City of Kansas City, Mo., 282 S.W. 2d 518, holding §71.015 unconstitutional as to Kansas City, is inapplicable."

Honorable C. A. Witte

The case which is referred to above, McConnell vs. City of Kansas City, 282 S.W. 2d 518, at l.c. 522, states with reference to Section 71.015:

"It must be apparent, then, that the Sawyer Act, which postpones the submission to the electors of an annexation proposal until a declaratory judgment action shall have been filed (and, incidentally, the time for filing such action is not specified) and finally determined, conflicts with the procedure provided by Art. VI, §20, of the Constitution and, therefore, that the Act is invalid as to charter cities to which Section 20 is applicable."

From the above we conclude that Section 71.015 is applicable to a first class city under the general law and that it is applicable to a special charter city, which is the subject of your inquiry. The City of Kansas City is a constitutional charter city, and for that reason is exempt from the application of Section 71.015, supra.

You also inquire regarding the applicability of Section 80.030, RSMo 1949. It appears evident that this section applies to the extension of the boundaries of towns and villages which is not in the classification which we are considering.

CONCLUSION

It is the opinion of this department that a special charter city of less than 20,000 inhabitants should extend its boundaries under the provisions of Section 81.080, RSMo Cum. Supp. 1957, and of Section 71.015, RSMo Cum. Supp. 1957 when unincorporated areas are to be annexed.

The foregoing opinion, which I hereby approve, was prepared by an Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

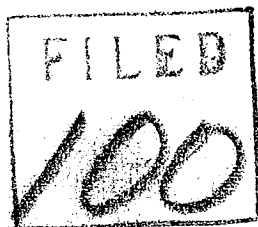
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ANIMALS@

DEAD BODIES:

STATUTES:

The proposed operation, as stated in this opinion request, comes within the purview of Chapter 269, RSMo 1949.



February 19, 1958

Honorable Edwin Yagel
Prosecuting Attorney
Linn County
Brookfield, Missouri

Dear Mr. Yagel:

This will acknowledge receipt of your request for an opinion of this Department which reads:

"Recently a rendering company from out state has established what they denominate a sub-station or dock for the collection of dead animals and commercial wastes from slaughter houses to be later transported out state for processing. This substation or dock is located approximately 1.4 miles from the corporate limits of the City of Brookfield, and as such was not licensed under Chapter 269, R.S. Mo. 1949, by the State Veterinarian.

"I have been informed by the manager of the company that they will no longer collect at the dock any dead animals, but it will be used solely for the purpose of collecting commercial wastes from animal and poultry slaughter houses.

"I would appreciate an opinion from you or your staff as to whether such operation comes within the purview of Chapter 269, R.S. Mo. 1949, and as such would require a license."

Most of the various statutes contained in Chapter 269, supra, deal specifically with the transportation of dead animals only and regulations and operation of disposal plants for disposing of said dead animals. (See Sections 269.010, 269.030, 269.040, 269.130, 269.150, 269.160, 269.170 and 269.180, RSMo 1949.)

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Section 269.010, subparagraph 2, RSMo 1949, defines "disposal plant" for the disposal of bodies of dead animals to also include substations or any subplant that may be used in connection with the bodies, solely for temporary deposit or storage of such dead bodies pending final delivery thereof to a disposal plant.

In view of the foregoing statute a substation or plant falls within the same classification as a disposal plant for the purpose of licensing and regulating same.

Under Section 269.030, supra, it is provided that no one shall engage in the business of disposing of or transporting on the highways or public roads of this state, bodies of dead animals, or of operating a disposal plant in this state without first obtaining a license for such purpose from the state veterinarian. Section 269.040, supra, requires an application be filed for the purpose of operating a disposal plant and also contains a provision that the applicant must show the number and location of all substations he desires to operate. The state veterinarian is required to ascertain under Section 269.050, supra, if said applicant is responsible and a suitable person to conduct such a business and if the methods of operation comply with all the provisions of Chapter 269 and rules and regulations of state veterinarian.

Section 269.210, supra, does specifically hold that any person, except when holding a license to operate a disposal plant in this state, or one holding a license to transport bodies of dead animals, or who is acting for such licensee, or who is otherwise excepted by Chapter 262, supra, who shall advertise that he is engaged in transporting and disposing of dead animals in any manner and for any purpose and not excepted in this chapter; or who shall obtain from any other person, by purchase or otherwise, the body of any such dead animal in whole or in part, for the purpose of transporting same over the highways of this state, and disposing of the carcass or the hide, skin, grease or other products of such dead animals to any person or by any method, shall be guilty of violating this chapter and subject to the penalties provided for in this chapter. See Section 269.220, "Penalties."

Section 269.200, RSMo 1949, contains certain exceptions to the provisions of Chapter 269, supra, however, nothing therein contains anything that could possibly exempt said company from this act while obtaining such commercial waste for the purposes stated in your request.

You state that such substation is to be used in the future for collecting commercial wastes from animal and poultry slaughterhouses. We assume by reference to commercial wastes that you have reference to what is commonly called tankage and tankage has been defined in

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Webster's New International Dictionary as follows: "[4]. Dried animal residues, as bones, tendons, etc., a by-product of slaughterhouses, rendering plants, etc., usually freed from the fat and gelatin and used as a fertilizer and feeding stuff." See also Darling and Co. vs. U.S., 12 Ct. Cust. App. 86, l.c. 87, wherein the decision of the court referred to evidence of the only witness who testified in the case defining tankage as follows:

"In packing houses there is certain parts of the animal, either cattle or hogs, that is not fit for human consumption--fleshings and even old animals, parts of hoofs, sinews, etc. There is a certain amount of fat in these products and packers are anxious to recover all the fat they can. The process is very simple. I can describe it by telling you that it is similar to making a beef stew. They are put in a tank and cooked the same as a stew and the grease is skimmed off the top and the rest of the material is tankage. It is called tankage because it was put in tanks."

By use of such language in Section 269.210, supra, i.e., by obtaining the body of any dead animal in whole or in part, for the purpose of transporting same over the state highways and of disposing of the carcass or hide, skin, grease or other product of said dead animals, we conclude that said statute is sufficiently broad enough to include so-called tankage or commercial waste from animals and, therefore, such proposed operation at such substation is within the purview of Section 269.210, RSMo 1949, and subject to the provision of Chapter 269, supra, and rules and regulations for enforcing same.

CONCLUSION

It is, therefore, the opinion of this Department that such proposed operation of transporting commercial wastes to such substation comes within the purview of Chapter 269, RSMo 1949, and, therefore, in order to so operate said company must obtain a license as provided therein.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw